(13)

No. 05-705
Title: Global Crossing Telecommunications, Inc., Petitioner
v.
Metrophones Telecommunications, Inc.
Docketed: December 2, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-35287)
Decision Date: September 8, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 25 2005	Petition for a writ of certiorari filed. (Response due January 3, 2006)
Jan 3 2006	Brief of respondent Metrophones Telecommunications, Inc. in opposition filed.
Jan 11 2006	Reply of petitioner Global Crossing Telecommunications, Inc. filed.
Jan 18 2006	DISTRIBUTED for Conference of February 17, 2006.
Feb 21 2006	Petition GRANTED limited to Question 1 presented by the petition.
Mar 20 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 22, 2006.
May 19 2006	Joint appendix filed.
May 22 2006	Brief of petitioner Global Crossing Telecommunications, Inc. filed.
May 22 2006	Brief amicus curiae of AT&T filed.
May 22 2006	Brief amicus curiae of Sprint Communications Company LP filed.
Jun 5 2006	Extension of time within which to file respondent's brief on the merits to and including July 26, 2006.
Jul 14 2006	SET FOR ARGUMENT on Tuesday, October 10, 2006.
Jul 17 2006	CIRCULATED.
Jul 26 2006	Brief of respondent Metrophones Telecommunications, Inc. filed. (Distributed)
Jul 26 2006	Brief amicus curiae of the United Statesl filed. (Distributed).
Jul 27 2006	Record received from U.S.C.A. for the 9th Circuit. (1 envelope)
Jul 27 2006	U.S.D.C. for the Western District of Washington is electronically filed (no hard copy).
Aug 8 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 14 2006	SET FOR ARGUMENT on Tuesday, October 10, 2006.
Aug 30 2006	Reply of petitioner Global Crossing Telecommunications, Inc. filed. (Distributed)
Sep 1 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 26 2006	Supplemental brief of respondent Metrophones Telecommunications, Inc. filed. (Distributed)
Oct 10 2006	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Roy T. Englert, Jr., Washington, D.C.; and James A. Feldman, Assistant to the Solicitor Generl, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

05-705 NOV 25 2005

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No. 05-

IN THE
Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 201(b) of the Communications Act of 1934 creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

2. Whether 47 U.S.C. § 276 the Communications Act of 1934 preempts state law claims for *quantum meruit* and breach of implied contract based on a long distance carrier's alleged failures to compensate a payphone service provider for coinless payphone calls.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states: Global Crossing Telecommunications, Inc., is an indirect, wholly owned subsidiary of Global Crossing Limited, a Bermuda corporation. Global Crossing Limited, in turn, is more than 10 percent owned by STT Crossing, Ltd., a wholly owned subsidiary of Singapore Technologies Telemedia, Pte., a Singapore entity that is wholly owned by the Government of Singapore.

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PETITON FOR A WRIT OF CERTIORARI

Petitioner Global Crossing Telecommunications, Inc., respectfully petitions for certiorari to the United States Court of Appeals for the Ninth Circuit in *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, No. 04-35287.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 423 F.3d 1056 (9th Cir. 2005), and is reproduced at App. 1a-39a. The relevant opinion of the district court is unpublished and is reproduced at App. 40a-58a.

JURISDICTION

The Ninth Circuit issued its opinion on September 8, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

47 U.S.C. § 201(a) provides in relevant part: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."

47 U.S.C. § 201(b) provides in relevant part: "All charges, practices, classifications, or regulations for and in conjunction with such telecommunications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."

47 U.S.C. § 206 provides in relevant part: "In case any common carrier shall do, or cause to be done, any act, matter,

or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter 5 required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter. . . ."

47 U.S.C. § 207 provides in relevant part: "Any person claiming to be damaged by a common carrier subject to the provisions of this chapter . . . may bring suit for the recovery of damages for which such common carrier shall be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction."

47 U.S.C. § 276(b)(1)(A), in relevant part, directs the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]."

47 U.S.C. § 276(c) provides: "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."

STATEMENT OF THE CASE

This case presents a direct conflict involving important provisions of the Communications Act of 1934, as augmented by the Telecommunications Act of 1996, and its implementing regulations.

A. Statutory Background

Since 1990, Congress has required owners and operators of payphones to allow consumers to use access codes (such as 800 numbers or "10-10-220") to make "coinless" calls from payphones. These codes allow consumers to "dial around" the

payphone service providers' preselected (and usually high-priced) long distance, or "interexchange," carriers. As a result, payphone service providers, as of 1990, did not receive any payment from their preselected carriers or individual callers for most of these types of calls. Furthermore, payphone service providers could not secure payment for most such calls from anyone else.

In light of that situation, Congress directed the FCC in the Telecommunications Act of 1996 to create "a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). After considering several alternatives, the FCC ultimately adopted what is sometimes called a "carrier pays" plan. It requires long distance carriers that carry coinless payphone calls to compensate payphone service providers for their customers' calls. *See* 47 C.F.R. §§ 64.1300-1340; *American Public Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000) (upholding the plan). The rules specify a default compensation rate for such calls, unless the payphone owners and long distance carriers contractually agree to other arrangements. 47 C.F.R. §§ 64.1300(b)-(d). The FCC's regulations also require carriers to track coinless payphone calls, report them to payphone owners, make payments on a quarterly basis, and submit their systems to rigorous audits.

Over the past several years, numerous payphone service providers have sued long distance carriers, seeking compensation allegedly due under the FCC's regulations. While some payphone service providers have brought these complaints in FCC administrative proceedings, most instead have filed lawsuits in various courts across the country.

Federal courts uniformly have recognized, however, that nothing in § 276 of the 1996 Act authorizes such lawsuits. That section, courts have emphasized, has no "rights creating"

language; it merely directs the FCC to adopt some form of regulatory plan – not even necessarily a "carrier pays" type plan. *See, e.g., APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1246 (D.C. Cir. 2005); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-52 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2026 (2004); *Phonetel Techs. v. Network Enhanced Telecom*, 197 F. Supp. 2d 720 (E.D. Tex. 2002). And while § 206 of the Communications Act of 1934 (which envelops the Telecommunications Act of 1996) allows private actions to remedy violations of the Act's *statutory* provisions, it does not allow such suits with respect to agency regulations. *Id.*

Accordingly, payphone service providers have attempted to manufacture other legal theories for bringing such actions in court. These substitute legal theories give rise to the current dispute.

B. The Current Controversy

In late 2001, Respondent Metrophones Communications, Inc., an owner and operator of payphones headquartered in Washington State, brought separate lawsuits in the United States District Court for the Western District of Washington against several long distance carriers, including Petitioner Global Crossing Telecommunications, Inc. Respondent alleges that for several years beginning in the late 1990's, Petitioner has failed to provide a proper accounting and to compensate it fully for coinless calls transmitted via Petitioner's network. Respondent seeks a judgment requiring Petitioner to conduct an accounting of amounts owed since the second quarter of 1999 and to pay such amounts, which allegedly total tens of thousands of dollars per year.

Respondent initially grounded its complaint in 47 U.S.C. § 276. After the Ninth Circuit ruled, however, that this statute did not provide a private right of action, *see Greene*, 340 F.3d

at 1053, Respondent moved to amend its complaint. Respondent asserted that sections 201(b), 407, and 416(c) of the Act permitted it to seek compensation in federal court. It also advanced several state-law theories for recovery. Petitioner moved to dismiss the case, on the ground that Respondent's complaint failed to state a cause of action and that all proposed amendments likewise would be futile.

The district court dismissed Respondent's § 276 claim but allowed it to amend its complaint, ruling that § 201(b) and § 416(c) – though not § 407 – create private rights of action to recover underpayments for coinless calls. App. 51a-53a. It also allowed Petitioner to proceed with state law claims for *quantum meruit*, breach of implied contract, and negligence. App. 46a-50a, 56a. Acknowledging that its rulings allowing Petitioner to proceed with various causes of action raised issues on which there is a "substantial ground for difference of opinion," App. 61a, the district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b).

Respondent and the other long distance carriers Petitioner had sued all filed appeals in the Ninth Circuit. Shortly thereafter, Respondent settled its cases with all of the carriers except for Petitioner.

The Ninth Circuit accepted Petitioner's appeal and affirmed in part and reversed in part. Creating a circuit split, and pushing aside language in its prior *Greene* decision saying that nothing anywhere in the Act created a private cause of action, App. 7a-8a, the Ninth Circuit held that § 201(b) gives rise to a private right of action to recover for violations of the FCC's payphone compensation rules. App. 6a-21a. It also held that § 276(c) of the Act – which prohibits any state requirements inconsistent with the federal regime – did not preempt Petitioner's state-law claims for *quantum meruit* or breach of implied contract. App. 24a-36a. The Ninth Circuit

rejected the remaining claims that the district court had allowed to go forward. App. 22a, 23a, 36a-38a.

REASONS FOR GRANTING THE WRIT

Pursuant to the Telecommunications Act of 1996, the FCC adopted regulations requiring long distance carriers to compensate payphone owners for the carriers' customers' "coinless" calls – calls, that is, made using access codes (such as 800 numbers or "10-10-220") instead of the payphones' preselected long distance carriers. The federal circuits are now expressly divided over what the FCC calls an "important" issue: whether § 201(b) of the Communications Act of 1934 – which broadly prohibits any "unjust and unreasonable" communications practice – creates a private right of action under which payphone owners may sue long distance carriers for alleged underpayments under the FCC's regulations. The D.C. Circuit has held that no such private cause of action exists, but the Ninth Circuit here ruled that one does.

This Court should grant review now to resolve this conflict, as well as the interrelated issue whether payphone owners may invoke state contract-law theories to seek additional compensation for coinless calls. Coinless calling generates hundreds of millions of dollars in annual revenue, and telecommunications companies – most of which operate across the country – need clear and uniform rules in order to structure and operate this business. Furthermore, the Ninth Circuit's ruling is wrong. The Ninth Circuit grounded its decision in the FCC's passing suggestion in a 2003 order that a private cause of action exists. But that suggestion was nothing more than brief dicta referring to a prior D.C. Circuit opinion, and the D.C. Circuit now has rebuked that interpretation of its precedent. More important, even if the FCC had spoken with sufficient perspicuity on this issue, the Ninth Circuit overlooks that federal agencies may not create private rights of action. Only Congress may do so, and it has not done so here.

Accordingly, this Court should bring the Ninth Circuit into line and make plain for the several similar lawsuits pending across the country – and for the several more that undoubtedly are waiting in the wings – that complaints with respect to the FCC's payphone compensation rules must be brought, it at all, administratively to the FCC.

I. This Court Should Resolve the Conflict Over Whether § 201(b) Of The Communications Act Of 1934 Creates A Private Right Of Action For A Long Distance Carrier's Alleged Violations Of The FCC's Regulations Regarding Compensation For Coinless Payphone Calls.

A. The Federal Circuits Are Expressly Divided Over This Issue.

Section 206 of the Communications Act of 1934 provides that telecommunications carriers may be held liable for anything prohibited or declared to be unlawful "in this chapter" – that is, in one of the Act's statutory provisions. Section § 201(b), in turn, generally declares unlawful any communications practice that is "unjust or unreasonable."

In 2003, while addressing an unrelated aspect of the FCC's payphone compensation rules, the FCC stated that any long distance carrier's failure to compensate a payphone service provider for coinless payphone calls would violate § 276 and be "unjust and unreasonable" under § 201(b). Without providing any additional detail, the FCC asserted simply that:

> [T]he D.C. Circuit in upholding the reasonableness of the Commission's decision in *APCC v. FCC*, [215 F.3d 51, 56 (D.C. Cir. 2000),] found that [payphone service providers] had remedies to recover [debts] from the delinquent carriers. A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly

> requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.

Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996, 18 F.C.C.R. 19,975, 19,990 ¶ 32 (2003) ("*2003 Payphone Order*").

Since the FCC made that statement, two federal circuits have considered whether § 276's command to establish a coinless call compensation system or § 201(b)'s "unjust or unreasonable" clause supplies any basis for payphone providers to sue long distance carriers in federal court to recover compensation allegedly owed pursuant to the FCC's payphone compensation rules. These circuits agreed that § 276 does not create any cause of action in federal court. *See APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1246 (D.C. Cir. 2005); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-52 (9th Cir. 2003), *cert. denied,* 124 S. Ct. 2026 (2004); *cf. Phonetel Techs. v. Network Enhanced Telecom,* 197 F. Supp. 2d 720 (E.D. Tex. 2002) (reaching same conclusion). These circuits, however, expressly dis-agreed as to whether § 201(b) creates a private cause of action. *Compare APCC Servs.*, 418 F.3d at 1247-48 *with* App. 6a-21a.

The D.C. Circuit was the first court to address the latter issue. It held that § 201(b) did not create a private right of action for violations of the FCC's payphone compensation rules, for that would "transform § 201(b) into a catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court" – a result plainly at odds with Congress' desire to limit private actions only to those rights created in the Act itself. *APCC Servs.*, 418 F.3d at 1247. The D.C. Circuit also rejected the argument that the FCC authoritatively interpreted § 201(b) as creating a private right

of action. *Id.* at 1247-48. The D.C. Circuit majority made clear that its prior opinion in *APCC v. FCC* did not stand for the proposition for which the FCC cited it in the *2003 Payphone Order*, so that order obviously could not constitute a reasoned or authoritative interpretation of the Act. *See APCC Servs.*, 418 F.3d at 1247-48; *see also id.* at 1253-54 (Ginsburg, C.J., dissenting) (arguing, to no avail, that FCC's *2003 Payphone Order* reasonably interpreted § 201(b) as creating private right of action). At least one federal district court since has adopted the D.C. Circuit's holding. *See Smartstop, Inc. v. AT&T Corp.*, 374 F. Supp. 2d 930 (D. Colo. 2005).

In the decision below, however, the Ninth Circuit expressly "disagree[d] with the majority opinion in [the D.C. Circuit] case and, instead, adopt[ed] the position of [that court's] dissenting judge" that § 201(b) does indeed create a private cause of action for violations of the FCC's payphone compensation rules. App. 13a n.5. Although the Ninth Circuit stated unequivocally in *Greene* that "[t]here is no private right of action . . . to recover damages for [a carrier's] alleged failures to pay compensation for [coinless] calls as required by FCC regulations," the court now said that § 201(b) had not been at fairly at issue there. App. 7a-8a (quoting *Greene*, 340 F.3d at 1053. Considering the import of § 201(b) supposedly for the first time, the Ninth Circuit held that the FCC's brief dicta in the *2003 Payphone Order* authoritatively deemed "unjust and unreasonable" a long distance carrier's failure to compensate a payphone service provider according to the FCC regulations. In addition, the Ninth Circuit concluded – notwithstanding the D.C. Circuit's rebuke in *APCC* of the FCC's dicta – that the FCC's assertion regarding § 201(b) was reasonable and thus entitled to deference. App. 6a-21a.

The Ninth Circuit acknowledged that interpreting § 201(b), as it was, to prohibit violating the FCC's payphone compensation regulations could logically convert that statutory provision into "a catchall provision equating violations of

Commission regulations with statutory violations." App. 18a (quoting Defendant's Brief). But because the FCC has not asserted (thus far, at least) that every violation of its regulations constitutes an "unjust and unreasonable" practice under 201(b), the Ninth Circuit declared that it did not need to address whether the logical import of its decision rendered that decision suspect. App. 18a-19a.

There is no way to reconcile the Ninth Circuit's decision here with the D.C. Circuit's *APCC* decision. The D.C. Circuit denied rehearing en banc, by a 5-3 vote, on November 10, 2005, so this is the only Court that can resolve the conflict.

B. There Is A Pressing Need For National Uniformity In This Realm Of Telecommunications Law.

The FCC participated as *amicus* in both the D.C. Circuit and Ninth Circuit cases, noting that these cases "raise[] important issues regarding enforcement of the Communications Act, in general, and the Act's payphone compensation provisions, in particular." Brief for FCC as Amicus Curiae in Support of Appellee at 1, *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir. 2005) (No. 04-35287); *see also APCC Servs.*, 418 F.3d at 1240 (acknowledging FCC *amicus* participation). The FCC's assessment of this issue's importance is correct, and there is a corresponding imperative for uniformity in this area, for three reasons.

1. As the district court in the case arising in the District of Columbia observed, "[t]he payphone industry is big business." *APCC Servs., Inc., v. Worldcom, Inc.*, 305 F. Supp. 2d 1, 7 (D.D.C. 2001), *rev'd, APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1247-48 (D.C. Cir. 2005). Of particular relevance here, coinless calling generates approximately $225 million per year in payphone compensation

payments from long distance carriers to payphone providers. Petitioner itself has paid over $21 million to payphone providers over the last eighteen months. Payphone providers nevertheless continue to seek even more compensation for coinless calls. The ways in which these disputes may be litigated matter greatly to companies involved – and to companies considering becoming involved – in the telecommunications industry.

2. Most major telecommunications carriers do business in several states, as do payphone owners accounting for most of the Nation's payphones. Petitioner, like other leading long distance carriers, transmits phone calls originating from payphones in all fifty states, and a significant portion of the traffic it handles originates from payphones. Petitioner handles not only its own retail traffic, but the traffic of numerous other, smaller long distance resellers.

Pursuant to the FCC's regulations, Petitioner has developed and implemented sophisticated tracking and payment systems, as well as rigorous audit procedures, covering its payphone compensation obligations. Petitioner developed these systems specifically to implement the FCC's uniform compensation processes. Having to address disparate judicial decisions threatens to disenable these uniform mechanisms. In particular, allowing payphone owners to bring lawsuits in some jurisdictions but not others potentially would require Petitioner to develop systems to accommodate different jurisdictions' requirements, many of which could depend – as described *infra* at 16-17 – on individual judges' interpretations of state common law.

The consequences of having telecommunications carriers subject to uneven judicial mandates is particularly unacceptable because the FCC is fully equipped to handle any complaints or disputes administratively. *See, e.g.*, 47 U.S.C. § 154(i) (granting FCC this power). Federal telecommunications

law and its implementing regulations form a complex, and frequently shifting, landscape. The FCC is expert at navigating that terrain. On the other hand, as the Ninth Circuit itself, drawing on precedent from other circuits, previously recognized:

> To imply a private right of action [to recover alleged underpayments for coinless payphone calls] runs counter to this centralization of function and to the development of a coherent national telecommunications policy. It would also put the interpretation of a finely-tuned regulatory scheme "squarely in the hands of some 700 federal district judges, instead of the Commission. . . . The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying telecommunications policy.

Greene, 340 F.3d at 1052-53 (quoting *Conboy v. AT&T Corp.,* 241 F.3d 242, 253 (2d Cir.2001) (quoting in turn *New England Tel. & Tel. Co. v. Public Utils. Comm'n,* 742 F.2d 1, 6 (1st Cir.1984) (Breyer, J.))).

3. If this Court delays resolving the conflict at issue here, many pending and future lawsuits promise to exacerbate the current legal confusion, with no offsetting benefit from further percolation. Over the past several years, payphone service providers have filed lawsuits in courts across the country – including in California, New York, Washington, Colorado, Utah, Virginia, Pennsylvania, Arizona, Nevada, Utah, and Texas – and the District of Columbia. *See Smartstop,* 374 F. Supp. 2d 930 (Colorado); *APCC Servs.,* 305 F. Supp. at 7-9 (describing actions in Utah, Virginia, Pennsylvania, and Arizona); *In re Qwest Communications Corp. Payphone Serv. Providers Compensation Litig.,* 219 F. Supp. 2d 1356 (J.P.M.D.L. 2002) (California, Nevada, and Utah); *Telemex Int'l, Inc. v. Global Crossing Telecommunications, Inc.,* No.

05-6374 (W.D.N.Y.) (pending; no published opinion yet); *Phonetel Techs.*, 197 F. Supp. 2d 720 (Texas). Some of these actions have settled, but others remain pending. Many more are sure to follow if this Court allows the Ninth Circuit's decision to stand.

This Court should promptly resolve whether the Communications Act allows such lawsuits to be brought. The D.C. and Ninth Circuits already have set out the opposing views on whether such a private cause of action exists. This Court would not gain anything by waiting for future circuits to choose sides. The sooner this Court brings uniformity to this important area of telecommunications law, the better.

C. The Ninth Circuit's Holding That Such A Private Cause Of Action Exists Is Incorrect.

The Ninth Circuit's holding that § 201(b) creates a private cause of action in federal court for a telecommunication carrier's alleged violations of the FCC's payphone compensation regulations is incorrect. This Court recently reaffirmed that "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval,* 532 U.S. 275, 286 (2001). And in considering whether Congress has created such a right, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right *but also a private remedy*." *Id.* (emphasis added). In other words, it is not enough to show that the statutory scheme confers the authority on an agency to craft substantive regulations; "the question remains whether [the statutory scheme] confers a private right of action to enforce them." *Id.* Without such a statutorily created right, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 287.

The Ninth Circuit disregarded these restrictions. It is true that § 201(b) generally declares that "unjust or unreasonable" practices in conjunction with telecommunications services are unlawful. Even assuming *arguendo* that the FCC authoritatively determined in its 2003 order that failing to compensate payphone service providers for coinless calls is "unjust or unreasonable,"[1] there is nothing in the Act that "confers a private right of action to enforce" that FCC determination in federal court. *Sandoval*, 532 U.S. at 286. Section 206 of the Act allows private lawsuits in federal court to seek redress only for actions declared unlawful "in this chapter"– that is, in a statutory provision. No *statutory provision* – neither § 276, the one provision that actually speaks to payphone compensation, nor the general language of § 201(b) – provides that failing to compensate a payphone service provider for coinless calls is unlawful.

The Ninth Circuit brushed aside this predicament, reasoning that additional statutory language in § 201(b) "gives the Commission broad power to enact such 'rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.'" App. 15a (quoting § 201(b)). The FCC's payphone compensation rules, the Ninth Circuit continued, can therefore be said simply to interpret § 201(b)'s "unjust or unreasonable" passage. But this circuitous method of suggesting that the FCC's payphone compensation requirements have a statutory basis runs headlong into *Sandoval*. In that case, this Court held that a statute giving federal agencies the authority to draft regulations to effectuate the provisions of

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[1] The D.C. Circuit, as explained above, rejected the argument that the FCC did so. *See APCC Servs.*, 418 F.3d at 1247-48. The Ninth Circuit, oddly enough, ruled that the FCC authoritatively determined that failing to compensate payphone service providers for dial around calls is "unjust or unreasonable," App. 10a-14a, even though this supposed FCC determination is dicta and rests solely an assertion that *the D.C. Circuit* has found such practices unlawful under the Act – a position that the D.C. Circuit now has squarely rebuked. App. 12a-13a & n.5.

a statutory scheme does *not* automatically transform ensuing regulatory prohibitions into statutory prohibitions. 532 U.S. at 284-89. When such regulatory prohibitions forbid something that – although within the agency's power to prohibit – is not otherwise prohibited in the statutory scheme, such prohibitions cannot claim the "statutory" grounding necessary to sustain a private cause of action. *Id.*

That is precisely the case here. The FCC may have the power to issue regulations that require certain carriers to compensate payphone service providers at a certain rate for coinless calls, but – as the Ninth Circuit itself acknowledged later in its opinion – the Act itself "does not impose any [such] obligations on carriers." App 18a. Accordingly, § 201(b)'s general "unjust or unreasonable" language cannot be read as doing so either, lest, as the D.C. Circuit recognized, it improperly be transformed into a "catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court." *APCC Servs.*, 418 F.3d at 1247.

II. This Court Should Resolve The Related Issue Whether The Communications Act Preempts State-Law Claims For *Quantum Meruit* And Breach Of Implied Contract Based On A Long Distance Carrier's Alleged Failures To Compensate A Payphone Service Provider For Coinless Phone Calls.

This Court also should review the Ninth Circuit's holding allowing payphone service providers to bring state law claims against long distance carriers for alleged failures to compensate providers for coinless calls. Section 276(c) of the Act expressly preempts state requirements "[t]o the extent [they] are inconsistent with the Commission's regulations." The Ninth Circuit, however, ruled that a payphone provider's claims for *quantum meruit* and breach of implied contract are consistent with federal regulations when, as here, the provider

"seek[s], under state law, exactly the same rate of compensation for the same calls as it would be entitled to receive under the federal regulations." App. 34a (*quantum meruit* claim); *see also* App. 33a (breach of implied contract claim).

The problem with this analysis is that it necessarily depends on the assumption that a private cause of action exists to enforce the FCC's payphone compensation rules. Federal requirements may form, as the FCC's payphone compensation rules here unquestionably do, a "critical element" of a plaintiff's state law claim only when a private cause of action exists to enforce those requirements. *Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341, 353 (2001). Therefore, if, as the D.C. Circuit has held, no private cause of action exists to enforce the FCC's payphone compensation rules, then plaintiffs cannot avoid this situation by bringing a breach of contract claim for failing to abide by the federal rules. *Id.*; *see also Broder v. Cablevision Sys. Corp.,* 418 F.3d 187, 198 (2d Cir. 2005) (holding that plaintiff may not bring state-law contract claim for violation of certain federal telecommunications pricing rules because no private cause of action exists to enforce such rules); *see also Grochowski v. Phoenix Constr.,* 318 F.3d 80, 86 (2d Cir. 2003) (holding that plaintiff may not bring state-law *quantum meruit* or breach of implied contract claim for failure to pay compensation according to certain federal prevailing wage schedules because no private cause of action exists to enforce such wage schedules); *Kemp v. Medtronic, Inc.,* 231 F.3d 216, 236 (6th Cir. 2000) ("Plaintiffs cannot circumvent" absence of a private right of action in federal statute by seeking to enforce it through state common-law claim). To allow such a backdoor method of enforcing federal regulations would "exert an extraneous pull on the scheme established by Congress, and is therefore pre-empted by that scheme." *Buckman Co.,* 531 U.S. at 353.

The Ninth Circuit also suggested – though it is unclear whether it independently held – that breach of implied contract claims are viable in this realm because the FCC regulations themselves "contemplate that [payphone service providers] and carriers, in some circumstances, will agree to contracts for payphone compensation with terms that differ from those contained in the regulations." App. 32a. It apparently follows, in the Ninth Circuit's view, that a state-law claim based on private contract principles cannot be inconsistent with the FCC regulations. *Id.*

This conclusion rests on a careless reading of the regulations. It is one thing to say that the regulations permit parties to *agree* to alternate compensation arrangements and another thing entirely to say that they permit states to invoke equitable principles (even if based on contract law) to *force* alternate arrangements upon unwilling parties.

Furthermore, the FCC specifically has explained that private compensation arrangements are allowed "so that small [long distance companies] may avoid the expense of instituting a tracking system" for coinless calls "and undergoing [third party] audit[s]" to ensure the system is accurate. *The Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* 70 Fed. Reg. 720, 720 (Jan. 5, 2005). In the absence of this circumstance, there is no suggestion whatsoever that the FCC's default compensation rules do not govern.

Respondent is a large company, and it already has created a sophisticated and costly call tracking system. It also has put into place record retention processes to meet the FCC's specific requirements and has undergone the appropriate audits. Accordingly, there is no reason why Petitioner, or the FCC, would want to allow Petitioner's compensation obligations with respect to coinless payphone calls to be governed by state-by-state contract law. Such state law would subject Respond-

ent and other large long distance carriers to potentially fifty sets of varying rules governing payphone compensation, with different limitations periods, different implied contractual duties, and different rules for damages – in short, different circumstances under which carriers would have to pay compensation for coinless calls. The inconsistencies in such a state of affairs would plainly undermine the Telecommunications Act's call for, and the industry's need for, uniform compensation rules.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METROPHONES TELECOMMUNICATIONS, INC., a Washington corporation, *Plaintiff-counter-defendant-Appellee,* v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation, *Defendant-counter-claimant-Appellant,* and UNIDENTIFIED COMPANIES I THROUGH X, *Defendants.*	No. 04-35287 D.C. No. CV-03-00694 OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued January 12, 2005, and
Resubmitted August 31, 2005
Seattle, Washington

Filed September 8, 2005

Before: Mary M. Schroeder, Chief Judge, and Alfred T. Goodwin and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

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Joel Marcus, Federal Communications Commission, Washington, D.C., for the amicus curiae.

OPINION

GRABER, Circuit Judge:

We again are asked to decide whether a provider of payphone services may sue a long distance carrier to recover compensation that federal regulations, 47 C.F.R. §§ 64.1300-.1340, obligate the carrier to pay. We faced that question once before, in *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-51 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004), and answered "no." This time, the circumstances have changed materially: since our decision in *Greene*, which was made without the participation of the Federal Communications Commission ("Commission" or "FCC"), the Commission has interpreted a provision of the Communications Act that we did *not* address explicitly in *Greene*, 47 U.S.C. § 201(b), to allow such actions. As we explain below, we defer to the Commission's reasonable, authoritative interpretation of that statute. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2702-12 (2005) ("*Brand X*") (deferring to the FCC's interpretation of a statute).

Consequently, we affirm the district court's decision to allow Plaintiff Metrophones Telecommunications, Inc., a payphone service provider, to go forward with its claim under § 201(b) against Defendant Global Crossing Telecommunications, Inc., a long distance carrier. We also hold that Plaintiff may pursue two of its three state law claims, because they are not preempted by 47 U.S.C. § 276(c). We reverse, however, the district court's decision to allow Plaintiff to pursue claims under 47 U.S.C. § 416(c) and under a third state-law theory.

I. BACKGROUND

A. *Statutory and Regulatory Background*

Before 1996, payphone service providers ("PSPs") were largely uncompensated for "dial-around" coinless calls – calls in which the caller uses an access code or a "1-800" number to place calls through a long distance carrier other than the carrier with which the PSP has a contract. *Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000). As of 1990, PSPs were prohibited by statute from blocking such dial-around calls, *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 559 (D.C. Cir. 1997) (per curiam), but were unable to secure payment for them. Therefore, in the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 5,[1] Congress directed the Commission to enact regulations establishing "a per call

[1] Congress directed that the Telecommunications Act of 1996 be inserted into the Communications Act of 1934. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999). In this opinion, we use "Communications Act" to refer to the entire statute – i.e., Title 47, Chapter 5 – and "Telecommunications Act" when referring specifically to the 1996 Act or to portions of the statute added in 1996.

compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A).

The Commission then adopted rules making particular carriers responsible for compensating PSPs for dial-around calls. 47 C.F.R. §§ 64.1300-.1340; *see also Sprint Corp. v. FCC*, 315 F.3d 369, 371-73 (D.C. Cir. 2003) (describing the development of the rules); *Pay Tel. Reclassification & Comp. Provisions of Telecommc'ns Act of 1996*, 18 F.C.C.R. 19,975 (2003) ("*2003 Payphone Order*") (adopting final rules for fair compensation of PSPs). The rules require carriers to pay PSPs on a per-call basis at a rate agreed upon by the parties, 47 C.F.R. § 64.1300(b), and set default per-call rates that are mandatory in the absence of such an agreement, *id.* § 64.1300(c), (d). The rules also set forth detailed compensation procedures and reporting requirements, which the parties may modify by agreement. *Id.* § 64.1310.

B. *Procedural History*

Plaintiff filed this action in district court alleging that Defendant had failed to pay the full amount owed for calls placed from Plaintiff's payphones. Originally, Plaintiff brought its action under 47 U.S.C. § 276 – the statute by which Congress had directed the Commission to enact regulations to fairly compensate PSPs. However, soon after Plaintiff filed its action, this court held that § 276 provides no private right of action – express or implied – to recover compensation for payphone calls. *Greene*, 340 F.3d at 1053.

In the wake of *Greene*, Defendant moved for judgment on the pleadings as to Plaintiff's federal claim. The district court agreed that *Greene* foreclosed Plaintiff's original claim under § 276, but permitted Plaintiff to amend its complaint to assert federal claims under 47 U.S.C. §§ 201(b) and 416(c), provisions dealing with "unjust and unreasonable" practices of carriers and the duty to comply with FCC orders, respectively. The court rejected Defendant's argument that those amendments would be futile because they would not survive a motion to dismiss.

Defendant also moved for judgment on the pleadings on Plaintiff's state law claim for "quantum meruit," arguing that the claim was preempted by 47 U.S.C. § 276(c), which expressly preempts state laws that are inconsistent with the federal regulations. The district court denied Defendant's motion, concluding that the quantum meruit claim was consistent with the federal regulations. For the same reason, the court allowed Plaintiff to add two additional state law claims for breach of implied contract and negligence.

The district court granted Defendant's motion requesting an interlocutory appeal, 28 U.S.C. § 1292(b), and we agreed to allow the appeal.

II. STANDARDS OF REVIEW

In an interlocutory appeal, we review de novo the district court's denial of a motion for judgment on the pleadings. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986) (reviewing de novo the denial of a motion to dismiss for failure to state a claim); *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir.) (reviewing de novo a dismissal

on the pleadings), *cert. denied*, 125 S.Ct. 498 (2004). The district court's interpretation of a statute is reviewed de novo, *SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003), as are its decisions regarding preemption, *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 927 (9th Cir. 2002).

We review for abuse of discretion the district court's decision to permit amendment of a complaint. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 853 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002). An error of law is one form of an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

III. DISCUSSION

A. *Plaintiff may pursue compensation in a private action under the FCC's reasonable, authoritative interpretation of 47 U.S.C. § 201(b).*

1. Greene *did not address 47 U.S.C. § 201(b).*

We recognized in *Greene* that any person who suffers damages as a result of a common carrier's violation of a "provision[] of this chapter" – that is, of the Communications Act, 47 United States Code, Chapter 5 – may seek recovery of those damages in federal court under 47 U.S.C. §§ 206 and 207.[2] *Greene*, 340 F.3d at 1050 & n.2.

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[2] Title 47 U.S.C. § 206 provides, in relevant part:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in

(Continued on following page)

Nonetheless, we held that a common carrier's failure to pay compensation for payphone calls does not violate 47 U.S.C. § 276 and therefore does not give rise to a claim under §§ 206 and 207. *Id.* at 1050-51. We reasoned that, although the regulations enacted *pursuant to* § 276 require carriers to pay PSPs, the *statute itself* merely requires the Commission to adopt regulations to ensure fair compensation for PSPs. *See id.* Because a claim under §§ 206 and 207 requires violation of a statute, and because a carrier does not violate § 276 directly when it fails to pay PSPs, "there is no violation of the Act to be remedied through the private right of action afforded by §§ 206 and 207." *Id.* at 1052.[3] The payphone regulations alone, we held, could not create an enforceable obligation where none existed in the statute. *Id.* at 1051 (citing *Alexander v. Sandoval*, 532 U.S. 275, 284-89 (2001)).

In *Greene*, we were not asked to decide whether a carrier's failure to compensate a PSP would violate provisions of the Communications Act *other than* § 276, nor did we give explicit consideration to any other provision of that Act. Nonetheless, several of our statements suggest

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consequence of any such violation of the provisions of this chapter. . . .

Section 207, in turn, gives injured parties the right either to make complaint before the Commission *or* to bring an action in district court. 47 U.S.C. § 207.

[3] The plaintiffs in *Greene* sought, in the alternative, to enforce § 276 through an implied cause of action under *Cort v. Ash*, 422 U.S. 66 (1975). The *Greene* panel's decision not to imply a private right of action to enforce the regulations, 340 F.3d at 1052-53, is not controlling here because Plaintiff asserts only the statutory cause of action provided for in §§ 206 and 207.

that our decision foreclosed any recovery of payphone compensation under federal law. For example, we said:

> There is no private right of action for the relief that PSPs seek, to recover damages for [a carrier's] alleged failure to pay compensation for dial-around calls as required by FCC regulations promulgated pursuant to § 276 of the Telecommunications Act.

Id. at 1053; *see also id.* at 1052 (stating that failure to pay a PSP causes "no violation of the Act"). Thus, the central question briefed by the parties in the present appeal is whether the broad statements in *Greene* preclude an action to enforce two different sections of the Act – 47 U.S.C. §§ 201(b) and 416(c) – that we did not address in *Greene*. We turn first to § 201(b) and conclude that, in view of the FCC's reasonable, authoritative interpretation of § 201(b), *Greene* does not prevent Plaintiff from bringing an action under that section.

2. *The FCC's interpretation of § 201(b) is entitled to deference.*

Section 201 requires common carriers to furnish "communication service upon reasonable request therefor," 47 U.S.C. § 201(a), and further states:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . .

Id. § 201(b). Plaintiff asserts that Defendant's failure to pay it proper compensation for dial-around calls violates

§ 201(b) because it is a "practice[] . . . in connection with . . . communication service" that is "unjust or unreasonable." Significantly, Plaintiff's interpretation of the statute is shared by the Commission, which stated in its *2003 Payphone Order* that

> [a] failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasonable practice in violation of section 201(b) of the Act.

18 F.C.C.R. at 19,990, ¶ 32; *see also APCC Servs., Inc.*, 20 F.C.C.R. 2073, 2085, ¶ 26 (2005) ("[A carrier's] failure to pay payphone compensation to [PSPs] violated section 64.1300(c) of the rules *and thus section[] . . . 201(b) of the Act.*" (emphasis added)).[4] The Commission also cited § 201, in addition to § 276 and several other sections, as the authority for its initial enactment of the payphone regulations in 1999. *See Implementation of Pay Tel. Reclassification & Comp. Provisions of Telecomms. Act of 1996*, 14 F.C.C.R. 2545, 2648, ¶ 232 (1999). Under the FCC's interpretation, the failure to pay compensation to PSPs violates § 201(b)'s prohibition of unjust or unreasonable practices and, therefore, is actionable in federal district court pursuant to §§ 206 and 207.

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[4] In both decisions, the Commission also stated that a failure to pay in accordance with the regulations violates § 276. *2003 Payphone Order*, 18 F.C.C.R. at 19,990, ¶ 32; *APCC Servs.*, 20 F.C.C.R. at 2085, ¶ 26. We need not address what effect, if any, this interpretation of § 276 has on our decision in *Greene*, because Plaintiff has not appealed the dismissal of its claim under § 276.

a. *Our implicit holding in* Greene *cannot trump the FCC's interpretation, if that interpretation is entitled to* Chevron *deference.*

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Brand X*, 125 S.Ct. at 2699. If we owe *Chevron* deference to the Commission's interpretation of § 201(b), then our own prior, contrary interpretation of the statute can trump the agency's construction *only* if our decision held that its "construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 2700.

After *Brand X*, there can be no doubt that *Greene* does not prevent us from affording deference to the FCC's interpretation of § 201(b), if deference is otherwise due. We did not mention § 201(b) in *Greene* and thus could not have offered an interpretation that "follows from the unambiguous terms" of the relevant statute, *Brand X*, 125 S.Ct. at 2700. Thus, even if Defendant is correct that *Greene's* holding should be interpreted to have covered § 201(b) implicitly, that implicit holding would be insufficient to trump an agency construction to which we owe deference. But the question remains: do we owe deference to the FCC's interpretation of § 201(b)?

b. *The* Chevron *framework applies.*

An administrative interpretation "qualifies for *Chevron* deference when it appears that Congress delegated

authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). In *Brand X*, the Supreme Court afforded *Chevron* deference to an interpretation contained in a declaratory ruling of the FCC. *See* 125 S.Ct. at 2699 (holding that, because the FCC is authorized to promulgate binding legal rules and it "issued the order under review in the exercise of that authority," its interpretation of the Communications Act was entitled to *Chevron* deference).

We see no reason to treat the interpretation of § 201(b) in the *2003 Payphone Order* differently, despite Defendant's argument that the interpretation is entitled to no deference because of its brevity. We rejected a similar argument in *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1242 (9th Cir. 1999): "Although the FCC's statements are brief and lack elaborate analysis, those statements deliberately and unambiguously single out paging providers for special notice." We explained that the FCC order contained "a relatively detailed and thorough attempt to explain the FCC's decisions concerning a very difficult statute" and that the statements did not "appear to have been made in anticipation of any particular litigation." *Id.*

Similarly, here, the statement in the *2003 Payphone Order* arose in the context of a complex decision about the operation of the whole system of payphone regulation. In context, it is apparent that the Commission considered the ability of PSPs to recover compensation for dial-around calls in private actions to be integral to the proper functioning of the payphone compensation system.

Some background is necessary to understand why this is so. The Commission has reversed positions several times on the issue of *which* carrier should pay the PSP when more than one carrier handles a single call. *See generally 2003 Payphone Order*, 18 F.C.C.R. at 19,977-83, ¶¶ 5-17. For example, a call may be carried from the payphone by an interexchange carrier, but completed to the recipient of the call by a switch-based reseller. In one phase of the development of the rules, interexchange carriers had to pay PSPs and then seek repayment from the switch-based reseller that completed the call. *Id.* at 19,981, ¶ 15; *id.* at 19,984, ¶ 20. However, in the final rules adopted in the 2003 Payphone Order, the Commission ordered switch-based resellers to pay PSPs directly. *Id.* at 19,986, ¶ 24.

PSPs opposed that final decision because it is easier for them to collect payment from only one entity (i.e., the interexchange carriers). The Commission rejected the PSPs' position in part because the PSPs could recover damages from delinquent carriers in private actions:

> To the extent that [the PSPs'] argument is based on ease in collecting owed debts, the D.C. Circuit . . . found that the PSPs had remedies to recover this debt from the delinquent carriers. A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.

Id. at 19,990, ¶ 32 (footnote omitted).[5] In short, in adopting the final rules in the *2003 Payphone Order*, the Commission relied on the availability of actions for damages under §§ 206 and 207.

Because it is apparent that the Commission's interpretation of § 201(b) was connected with the broader reasoning that led to its adoption of the final rules, we find no reason to think that the interpretation of § 201(b) advanced in the *2003 Payphone Order*, and supplemented by the Commission's amicus briefs in this case, is not the "fair and considered judgment" of the agency. *See Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 563 n.7 (9th Cir. 2002) (noting that the fact that an agency's interpretation of a statute that it administers "comes to us in the form of an *amicus* brief does not make it 'unworthy of deference'" (quoting *Auer v. Robbins*, 519 U.S. 452, 462

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[5] The Commission was referring to a D.C. Circuit decision in which the court upheld the Commission's determination of the cost per payphone call. *See Am. Pub. Communications Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000). The court there reasoned that it was reasonable to exclude uncollected debt from the per-call cost because, "[a]s intervenor long distance carriers remind us, the '[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties.' *See* 47 U.S.C. §§ 206-08, 501-03 (1994)." *Id.*

The D.C. Circuit since has held that private actions, in fact, are not available under the Act. *APCC Servs., Inc. v. Sprint Commc'ns Co.*, No. 04-7034, 2005 WL 1512837, at *5-*10 (D.C. Cir. June 28, 2005) (per curiam). For the reasons that we articulate, we disagree with the majority's opinion in that case and, instead, we adopt the position of the dissenting judge: that "the Commission acted [ ]reasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice." *Id.* at *15 (Ginsburg, J., dissenting in part and from the judgment).

(1997))). Thus, we will apply the *Chevron* framework to the FCC's interpretation of § 201(b).

c. *The FCC's interpretation of § 201(b) is a reasonable construction of an ambiguous statutory provision.*

Under *Chevron's* two-step analysis, we first must determine whether the statute makes Congress' intent clear; if so, we must "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If not, and the statute is ambiguous as to the precise question at issue, "we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'" *Brand X*, 125 S.Ct. at 2702 (quoting *Chevron*, 467 U.S. at 845).

We conclude that the text of § 201(b) does not unambiguously answer the precise question at issue here: whether the failure to pay a PSP is a "practice[] . . . in connection with . . . communication service" that is "unjust or unreasonable." In determining whether Congress clearly expressed its intent with regard to that question, we must consider § 201(b) in its statutory context. *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060-61 (9th Cir. 2003) (en banc).

"Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms," courts normally owe "substantial deference to the interpretation the Commission accords them." *See Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994). The statutory context does not convince us otherwise. The portion of § 201(b) at issue here is among the core original provisions of the Communications Act of 1934, which required

telecommunications carriers to file with the Commission "a list of tariffs, or 'schedules,' showing 'all charges . . . and . . . the classifications, practices, and regulations affecting such charges.'" *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir.) (quoting 47 U.S.C. § 203(a)), *cert. denied*, 540 U.S. 811 (2003).[6] The Commission may initiate hearings at which carriers must defend their tariffs, 47 U.S.C. § 204; after such hearings, the Commission may "determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair, and reasonable," *id.* § 205(a).

We first dispense with the idea that Congress clearly intended to limit the practices that can be deemed "unjust or unreasonable," under § 201(b), to those that are contrary to practices prescribed solely under the authority of § 205. To the contrary, it appears to us that Congress has extended the scope of § 201(b) far beyond those core original provisions. Section 201(b) gives the Commission broad power to enact such "rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," *including* sections that were added later by the Telecommunications Act of 1996. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 & n.5 (1999) (holding that the Commission's rulemaking

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[6] Although the tariff-filing provisions of the Act have not changed, in 1996 Congress authorized the Commission to stop enforcing the rate-filing requirements, which apparently it has done. *See Ting*, 319 F.3d at 1132 (describing the Commission's decision to "forbear from applying" the tariff filing requirements of 47 U.S.C. § 203, as it was newly authorized to do by 47 U.S.C. § 160(a)). The Commission decided that "market forces [are] sufficient to protect consumers from unjust and unreasonable rates, terms, and conditions" and now requires carriers to establish contracts with consumers. *Id.*

authority under § 201(b) extends to the implementation of provisions enacted in 1996). And, as we mentioned above, the Commission cited both §§ 201 to 205 *and* § 276 as its authority for enacting the payphone regulations. Given the reach of the Commission's rulemaking authority under § 201(b), it would be strange to hold that Congress narrowly limited the Commission's power to deem a practice "unjust or unreasonable." This is especially true now that Congress has given the Commission the authority to waive the tariff-filing requirements, *see supra* note 6, presumably reducing the relevance of the specific procedures provided for in §§ 203 to 205.

Second, although we agree that there are statutory constraints on the Commission's power to deem a practice "unjust and unreasonable," we do not think it clear from the statutory context that Congress intended to limit "practices . . . in connection with . . . communication service," 47 U.S.C. § 201(b), to those that directly involve a carrier's relationship with its customers. Certainly, as the Supreme Court has held in construing closely related statutes, the term "practice" must be interpreted to be consistent with the words around it – that is, it must be a practice connected "with the fixing of rates to be charged and prescribing of service to be rendered." *Mo. Pac. R. Co. v. Norwood*, 283 U.S. 249, 257 (1931); *see also United States v. Pa. R.R. Co.*, 242 U.S. 208, 229 (1916) ("[W]e must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates.").[7] But unlike practices involving a carrier's

[7] The Supreme Court construed the term "practice" as used in the Interstate Commerce Act ("ICA"), from which the Communications Act was derived. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934) (detailing

(Continued on following page)

general corporate governance, *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400-02 (D.C. Cir. 2004), or its employment decisions, *Mo. Pac.*, 283 U.S. at 257, the practice of providing compensation to PSPs for payphone service is not clearly unrelated to a carrier's telephone rates and services. As Congress and the Commission have recognized, PSPs must be compensated if customers are to be able to use the dial-around long distance service that the carrier provides. *See, e.g.*, 47 U.S.C. § 276(b)(1) (ordering the Commission to prescribe regulations "[i]n order to promote competition among [PSPs] and promote the widespread deployment of payphone services to the benefit of the general public"). In short, § 201(b) is ambiguous enough that unjust or unreasonable practices can encompass a broad range of activities related to the services provided and rates charged by a long distance carrier. *Cf. La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 371-72 (1986) (holding that the terms "charges," "classifications," and "practices," as used in section 152(b) of the Communications Act, encompass a company's internal accounting and depreciation practices), *superseded by statute on other grounds as stated in New York v. FCC*, 267 F.3d 91, 101-02 (2d Cir. 2001). The activity deemed unjust and unreasonable here does not cross the line.

Finally, we consider whether Congress, in § 276 itself, expressed a clear intent to make private actions to recover payphone compensation unavailable under any provision of the Act. We conclude that it did not. It may be that § 276

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the provisions of the ICA from which Congress drew each section of the Communications Act). "[D]ecisions construing the ICA are persuasive in establishing the meaning of the Communications Act." *Conboy v. AT&T Corp.*, 241 F.3d 242, 250 (2d Cir. 2001).

does not itself oblige carriers to pay PSPs, as we held in *Greene*, 340 F.3d at 1050-51, but nothing in the text of § 276 suggests that Congress intended to prevent the obligations that *other* statutes impose on carriers from being enforced as part of the system of payphone regulation that it ordered the Commission to design. This is not a situation in which a more general statute, § 201(b), has been interpreted to create a private right of action where a more specific section, § 276, has been interpreted not to create one. *Cf. Santiago Salgado v. Garcia*, 384 F.3d 769, 774 (9th Cir. 2004) (noting the "elementary tenet of statutory construction that where there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one" (internal quotation marks omitted)), *cert. denied*, 125 S.Ct. 1670 (2005). That is, although § 276 more specifically addresses the subject of payphone regulation, it does not impose any obligations on carriers – and, perhaps more importantly, does not relieve them of any obligations. On the subject of a common carrier's obligations, § 276 is silent and cannot be considered more specific than § 201(b).

In sum, we conclude that nothing in the statute clearly precludes the construction offered by the Commission. Next, we must determine whether that construction was a "reasonable policy choice" or, instead, was "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 845, 844.

Defendant argues that the Commission's interpretation is unreasonable because it would convert § 201(b) into a "catchall provision equating violations of Commission regulations with statutory violations." But, as the Supreme Court said in *Brand X*, "[w]e need not decide

whether a construction that resulted in these consequences would be unreasonable because we do not believe that these results follow from the construction the Commission adopted." 125 S.Ct. at 2708. In other words, the Commission did *not* conclude that every violation of its regulations is an "unjust and unreasonable" practice, nor does its interpretation necessarily mean that a violation of any other regulation is an "unjust and unreasonable practice." Instead, the Commission identified as "unjust and unreasonable" a single practice, and we must determine whether the agency acted reasonably with respect to that practice.

We think that it did. Without repeating our discussion above, we reiterate that we have no reason to think that the FCC acted unreasonably when it deemed the failure to pay compensation to PSPs to be a "practice[ ]" in connection with "communication service." The Commission has "invoked § 201(b) in several contexts" to which the Commission's authority to prescribe just and reasonable charges and practices under § 205 "does not pertain" and which do not pertain directly to a carrier-customer relationship. *APCC Servs., Inc. v. Sprint Commc'ns Co.*, No. 04-7034, 2005 WL 1512837, at *15 (D.C. Cir. June 28, 2005) (per curiam) (Ginsburg, J., dissenting in part and from the judgment) (citing *ASCOM Commc'ns, Inc. v. Sprint Commc'ns Co.*, 15 F.C.C.R. 3223, 3227 (2000) (addressing a carrier's attempts to collect payments from a PSP for certain payphone calls); *Tel. No. Portability*, 18 F.C.C.R. 23697, 23709 n.76 (2003) (addressing the FCC's telephone number portability rules); and *Core Commc'ns, Inc. v. SBC Comm'ns, Inc.*, 18 F.C.C.R. 7568, 7578, ¶ 25 (2003) (addressing a carrier's failure to comply with merger conditions)). We are "hard-pressed" to say that the

FCC acted unreasonably in determining what is "unjust and unreasonable" under § 201(b). *Id.*

Moreover, as we discussed above, the Commission did not unreasonably interpret Congress' intent in enacting § 276. It is apparent from the *2003 Payphone Order* that allowing for private actions to recover payphone compensation is an integral part of the regulatory system that Congress ordered the Commission to design. As the Commission further explains in its amicus brief, foreclosing private actions under federal law "would appear to deny payphone providers a damages remedy *anywhere*," including before the Commission. That is because the statutory basis for relief is the same in either forum: Section 206 makes common carriers liable in damages for violations of "this chapter" and § 207 gives injured persons a choice of federal fora to recover those damages – the person either may "make complaint to the Commission" *or* "may bring suit for the recovery of the damages . . . in any district court of the United States of competent jurisdiction." As the Commission explains:

> In the absence of a damages remedy under §§ 206-208, the Commission still might impose penalties for violations of its rules under 47 U.S.C. § 502, but such payments would go to the United States Treasury, not to compensate payphone providers. Such sanctions would fail to fulfill the mandate of § 276(b)(1)(A) that "all payphone service providers are fairly compensated for each and every completed intrastate and interstate call."

It is, at the very least, reasonable for the FCC to conclude that Congress would not have intended to grant PSPs an entitlement to compensation and to give the Commission

broad authority to establish a mechanism to provide that compensation, but simultaneously to limit the enforcement of the statute and implementing regulations to the imposition of civil penalties. Thus, even if it is true, as we held in *Greene*, that Congress did not create a cause of action in § 276, the Commission reasonably interpreted § 201(b) to fill the gap.

Of course, our decision in *Greene* relied on policy considerations that would favor the opposite conclusion. *See, e.g., Greene*, 340 F.3d at 1053 ("To imply a private right of action runs counter to this centralization of function and to the development of a coherent national communications policy."). But, as the Supreme Court recently reiterated, resolving statutory ambiguities "involves difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 125 S.Ct. at 2699 (citing *Chevron*, 467 U.S. at 865-66). In that spirit, we defer to the Commission's reasonable, authoritative interpretation of § 201(b) and hold that a private action is available to remedy the unjust and unreasonable practice of failing to pay PSPs according to the Commission's regulations.[8] Therefore, we affirm the district court's decision to grant Plaintiff leave to amend its complaint to include a claim under that section. However, as we explain below, we reverse the court's decision to allow Plaintiff to add a claim under § 416(c).

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[8] Our decision is consistent with *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001), where the Court stated: "A Congress that intends the statute to be enforced through a private cause of action intends the *authoritative interpretation of the statute* to be so enforced as well." (Emphasis added.)

3. *The Commission's interpretation of § 416(c) is not entitled to deference.*

The Commission joins Plaintiff in arguing that a carrier's obligation to compensate PSPs is enforceable as a violation of 47 U.S.C. § 416(c), a provision of the Communication Act's "Procedural and Administrative" subchapter, which states:

> It shall be the duty of every person . . . to observe and comply with . . . orders [of the Commission] so long as the same shall remain in effect.

Plaintiff and the Commission assert that a failure to comply with the payphone regulations is a violation of § 416(c) and is therefore actionable under §§ 206 and 207.[9]

We have interpreted the term "order," in 47 U.S.C. § 401(b), to encompass rulemaking orders and regulations as well as adjudicative orders. *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1270-72 (9th Cir. 1987). In view of that controlling precedent, we find no fault with the Commission's opinion that the payphone regulations are "orders" within the meaning of § 416(c). Nonetheless, we conclude that the Commission's interpretation of § 416(c) is unreasonable because it would make *every*

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[9] Unlike the Commission's interpretation of § 201(b), this interpretation of § 416(c) is not found in any FCC order and comes only from the agency's amicus briefs. We need not address whether or how the format of the Commission's interpretation affects the level of deference we afford it, because we conclude that the Commission's interpretation of § 416(c) is contrary to the clear intent of Congress. *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (determining first whether an agency interpretation is contrary to the clear intent of Congress and, only if it is not, reaching the question whether that interpretation carries the "force of law").

pronouncement of the Commission automatically enforceable in a private action, contrary to the intent of Congress. It is technically true that § 416(c) makes a violation of any "order" of the Commission a violation of the statute itself and, thus, according to the Commission, would give rise to an action under §§ 206 and 207. But to hold that §§ 206 and 207 encompass all violations of § 416(c) would render superfluous the requirement that an action under § 206 allege a violation of a *statute*. *Cf. Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2005) ("We try to avoid, where possible, an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress." (internal quotation marks omitted)). And, because nothing (or, perhaps, everything) is prohibited by the text of § 416(c), adopting this construction would create, automatically, a private action for violation of any "order." By contrast, under § 201(b), the Commission must conclude that a practice is reasonably related to rates and services and is substantively "unjust or unreasonable" before a private action can exist.

In sum, we interpret the text of § 206 to mean that Congress did not intend for every violation of a regulation to give rise to a private action for damages. The Commission's interpretation of §§ 206, 207, and 416(c) is plainly contrary to that intent. Therefore, that interpretation is due no deference, and we reverse the district court's decision to grant Plaintiff leave to add a claim under § 416(c).

On the second question presented in this appeal, whether Plaintiff's state law claims are preempted, the Commission takes no position. We now turn to that question.

B. *Plaintiff's state law claims for breach of implied contract and "quantum meruit" are not preempted.*

"The purpose of Congress is the ultimate touchstone" in any preemption analysis, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted), so we look first and foremost to Congress' express statement of its intent:

> To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

47 U.S.C. § 276(c); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (stating that the plain wording of an "express pre-emption clause . . . necessarily contains the best evidence of Congress' pre-emptive intent"). The presence of an express preemption provision supports an inference that Congress did not intend to preempt matters *beyond* the reach of that provision. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (citing *Cipollone*, 505 U.S. at 517). But an express provision does not categorically preclude courts from applying principles of implied preemption. *Id.* at 288-89. Moreover, "even when Congress declares its preemptive intent in express language, deciding exactly *what* it meant to preempt often resembles an exercise in implied preemption analysis." 1 Laurence H. Tribe, American Constitutional Law § 6-28, at 1177 (3d ed. 2000). Thus, despite our primary focus on the text of § 276(c), it bears mentioning that the Supreme Court has

> recognized at least *two types of implied pre-emption: field pre-emption*, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room

> for the States to supplement it, and *conflict preemption*, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (citations and internal quotation marks omitted) (emphasis added).

Field preemption is absent here. It is true that § 276 substantially expands the Commission's jurisdiction and gives it broad authority to regulate both intrastate and interstate payphone calls. *See, e.g., Ill. Pub. Telecomms. Ass'n*, 117 F.3d at 561-62 (holding that the Commission may regulate rates for local coin calls). Yet, by expressly limiting federal preemption to state requirements that are *inconsistent* with the federal regulations, Congress signaled its intent not to occupy the entire field of payphone regulation. *See Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1133 (9th Cir.), *amended by* 350 F.3d 915 (9th Cir. 2003) ("[T]he 'express provisions for preemption of some state laws,' the inconsistent ones, 'imply that Congress intentionally did not preempt state law generally.'" (quoting *Keams v. Tempe Technical Inst., Inc.*, 39 F.3d 222, 225 (9th Cir. 1994))); *Total TV v. Palmer Commc'ns, Inc.*, 69 F.3d 298, 303 (9th Cir. 1995) (holding that a provision preempting inconsistent state laws was "simply a recognition that Congress did not intend to fully occupy the field"). Our conclusion is reinforced by the Communication Act's savings clause: "Nothing in this chapter contained

shall in any way abridge or alter the remedies now existing at common law or by statute. . . . " 47 U.S.C. § 414.[10]

Principles of implied *conflict* preemption, however, are relevant to our analysis, at least insofar as they help us interpret the scope of the express preemption provision. In fact, our analysis of whether state requirements are "inconsistent" with the federal regulations within the meaning of § 276(c) is substantially identical to the analysis of implied conflict preemption: whether "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Gade*, 505 U.S. at 98 (internal quotation marks omitted), or, as is more relevant in applying § 276(c), the purposes and objectives of the Commission.[11]

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[10] We also have held that federal regulation of telecommunications, in general, does not completely preempt state law. *Ting*, 319 F.3d at 1136-37; *see id.* at 1137 ("Detariffing has created a much larger role for state law and this fact is sufficient to preclude a finding that Congress intended completely to occupy the field, following the 1996 Act.").

[11] Only state requirements inconsistent with the *Commission's regulations* are preempted. 47 U.S.C. § 276(c). That fact does not absolutely preclude us from identifying a broader scope of implied preemption within § 276, but we see no cause for doing so here. Although we discern in § 276 a clear intent to create a comprehensive federal plan for payphone regulation, Congress left it to the Commission to decide how to structure the regulations and enforcement mechanisms. Congress did not express a preference for absolute national uniformity or exclusive federal enforcement, leaving those decisions to the Commission and expressly allowing for the operation of state law if consistent with the Commission's chosen plan. *Cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 675 (1993) (holding that an express provision preempting all state laws "*relating to* railroad safety" was broad and would preempt state claims that cover the same subject matter) (emphasis added). Thus, in keeping with Congress' expressed intent, we will focus primarily on the purposes and objectives of the Commission's regulations.

Under both implied conflict preemption and our interpretation of § 276(c), state law is preempted "to the extent it actually interferes with the methods by which the federal [regulatory scheme] was designed to reach its goal." *Ting*, 319 F.3d at 1137 (internal quotation marks omitted).

Our task, then, is to discern the "full purposes and objectives" of the Commission's regulations and to determine whether Plaintiff's state law claims interfere, or are otherwise inconsistent, with them.

1. *The payphone regulations set defaults, but generally do not mandate uniformity.*

The Commission's regulatory system addresses three principal issues: (1) who must pay for which calls; (2) how much must they pay; (3) and what procedures must be followed in making payment. *See generally* 47 C.F.R. § 64.1300-.1340. On the latter two issues, at least, the Commission's rules are not inflexible prescriptions. In keeping with the Commission's trend toward market-based regulation, the rules allow carriers and PSPs to set alternative compensation amounts and payment methods by contract.

On the first issue – who must pay – the Commission has changed course several times but now has fixed a definite rule, as we discussed above. The rules distinctly assign liability for payment to particular classes of carriers, *see* 47 C.F.R. § 64.1300, and the Commission has sought to ensure that parties are not permitted, in negotiations over payment arrangements, to shift the effective liability for payment to other carriers. *See* The Pay Telephone Reclassification and Compensation Provisions of the

Telecommunications Act of 1996, 70 Fed. Reg. 720, 721, ¶ 11 (Jan. 5, 2005) ("*2005 Reconsideration Order*") ("For instance, demands by PSPs that an [alternative compensation arrangement] contain a provision that forces [interexchange carriers] to assume ultimate responsibility for the payphone compensation obligations of [switchbased resellers] would undermine the Commission's determination in the [*2003 Payphone Order*] that [interexchange carriers] are not liable for such payphone compensation.").

By contrast, the rules expressly allow carriers and PSPs to negotiate compensation amounts and payment methods that differ from the defaults set by the Commission. In 47 C.F.R. § 64.1300(b), carriers are directed to compensate PSPs on a per-call basis "at a rate agreed upon by the parties by contract"; only in the next subsections does the rule establish default per-call rates to be paid "[i]n the absence of an agreement." 47 C.F.R. § 64.1300(c), (d); *see also id.* § 64.1301(a) (setting various default rates "[i]n the absence of a negotiated agreement to pay a different amount"). Similarly, the rules lay out detailed reporting and payment procedures – which are intended to give PSPs the information they need to determine which carrier completed, and therefore was responsible for paying for, each call made from their payphones – but nonetheless allow parties to waive those procedures by agreeing to "alternative compensation arrangement[s]." *Id.* § 64.1310(a).[12]

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[12] The Commission has asserted some control over this contracting relationship. In January 2005, the Commission amended its rule to provide that a PSP "may not unreasonably withhold its consent to an alternative compensation arrangement." *2005 Reconsideration Order*, 70 Fed. Reg. at 723. Along with this amendment, the Commission

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In short, the payphone regulations fix liability for payment upon particular carriers, but allow the parties to negotiate about the details of that payment. *See Fair v. Sprint Payphone Servs., Inc.*, 148 F. Supp. 2d 622, 626 (D.S.C. 2001) ("[T]he FCC has left it to the parties to determine by contract the rates at which payphone service providers are to be compensated."). In the absence of an agreement, the regulations set a defined price and payment procedure.

The Commission's reliance on market-based ratesetting mechanisms is part of a broader trend in telecommunications regulation – a trend that has opened up more space for the operation of state law. For example, in the 1996 Act, Congress authorized the Commission to eliminate its longstanding requirement that telecommunications carriers file their rates, terms, and conditions with the FCC. *Ting*, 319 F.3d at 1130-32. Now, carriers generally establish contracts with consumers to govern rates, terms, and conditions, and the Commission relies principally on market competition to produce the "just and reasonable" rates required by 47 U.S.C. § 201. *Id.* at 1132. As we said in *Ting*:

> Unlike rate filing, this market-based method depends in part on state law for the protection of consumers in the deregulated and competitive marketplace. This dependence creates a compl[e]mentary role between federal and state law under the 1996 Act.

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published an order providing "guidance on the types of contracts that it would deem to be reasonable methods of compensating PSPs." *Id.* at 720.

Id. at 1141. In this environment, we cannot simply hold that all state law claims, in general, are inconsistent with federal regulation of telecommunications, especially where the payphone regulations are silent as to the method of enforcement and the role of state law. Therefore, we must look carefully at Plaintiff's state law claims to determine whether they complement, or are inconsistent with, the federal payphone regulations.

2. *Plaintiff's state law claims may go forward to the extent that they are not inconsistent with federal regulations.*

As an initial matter, we note that a provision expressly preempting certain state "requirements," like § 276(c), can "reach [] beyond positive enactments, such as statutes and regulations, to embrace common-law duties." *Bates v. Dow Agroscis. LLC*, 125 S.Ct. 1788, 1798 (2005). To determine whether Plaintiff's state law claims are preempted, we must consider the theory of each claim and determine "whether the legal duty that is the predicate" of that claim is inconsistent with the federal regulations. *Cipollone*, 505 U.S. at 523-24; *see also Ishikawa*, 343 F.3d at 1132 ("[W]e cannot see how *the duty the state common law imposed* . . . could be inconsistent with the federal guidelines, which require the same thing with more specificity." (emphasis added)). Even when a state law requirement must be equivalent to a federal regulation to survive preemption, it is not necessary at the pleading stage that the state requirement "be phrased in the *identical* language as its corresponding [federal] requirement." *Bates*, 125 S.Ct. at 1804; *see also id.* (noting that, at the trial stage, the court's jury instructions can ensure that the state claim does not exceed its proper scope).

Plaintiff's amended complaint asserts three claims for violation of state law: quantum meruit (or "unjust enrichment," as this claim was labeled in Plaintiff's amended complaint), breach of implied contract, and negligence. We look to Washington law and to the allegations in Plaintiff's complaint to flesh out the legal duty that Plaintiff seeks to enforce.[13] So far as is apparent from the pleadings, Plaintiff's "implied contract" and "quantum meruit" or "unjust enrichment" claims correspond to the two types of implied contracts recognized under Washington law: contracts implied in fact and contracts implied in law, respectively.

a. *Contract Implied in Fact*

A contract implied in fact is like an express contract except that it arises not from the parties' words, but instead from actions or circumstances that demonstrate a mutual intention to enter into a contract. *See Heaton v. Imus*, 608 P.2d 631, 632 (Wash. 1980) ("A contract implied in fact is an agreement of the parties arrived at from their conduct rather than their expressions of assent."); *Eaton v. Engelcke Mfg., Inc.*, 681 P.2d 1312, 1314 (Wash. Ct. App. 1984) ("A true implied contract, or contract implied in fact, does not describe a legal relationship which differs from an express contract: only the mode of proof is different."). "[T]he legal relationship formed does not differ whether the contract is expressed or implied in fact." 25 Wash. Prac., Contract Law and Practice § 1.16 (West 1998).

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[13] In so doing, we make no comment as to the merits of any of Plaintiff's claims. Defendant has not argued, thus far in the litigation, that any of those claims fails to state a claim under Washington law.

In its claim for breach of "implied contract," Plaintiff characterizes the interaction between itself and Defendant as conduct evidencing a mutual intention to enter into a contract. Plaintiff's theory is that, by making its payphones available to the general public, Plaintiff impliedly offered them for the use of Defendant's customers at the rates established by the FCC. Then, "[b]y accepting, transporting, and completing calls made from Plaintiff's payphones by Defendant['s] customers, Defendant[] impliedly accepted Plaintiff's offer of service," forming a contract for payphone compensation in the exact amount set by the FCC.

This claim, insofar as it is premised on the existence of a contract between the parties, cannot be preempted by § 276(c). The Commission's regulations contemplate that PSPs and carriers, in some circumstances, will agree to contracts for payphone compensation with terms that differ from those contained in the regulations. *See* discussion *supra* Part III.B.1, pp. 12770-72. In those circumstances, state contract law, not the federal regulations, would govern the resolution of contract-related questions, such as whether a contract was formed, what terms the parties agreed to, and whether the contract was breached. *See, e.g., Fair*, 148 F. Supp. 2d at 626 ("While federal regulations authorize the existence of payphone compensation contracts, whether the specific agreements at issue in the present case are illegal will be determined by state law."). As in the context of ratemaking, where private contracts have replaced rigid rate prescriptions, state contract laws provide a background that is not only consistent with, but is integral to, the market-based mechanism of the federal regulations. *See Ting*, 319 F.3d

at 1146 (holding that state consumer protection laws do not conflict with 47 U.S.C. §§ 201 and 202).

The state law claim is even stronger when the implied agreement is to pay what the FCC requires. Seeking such payments cannot, by definition, be inconsistent with what the FCC requires.

b. *Contract Implied in Law*

The preemption question becomes more complicated where the premise of the claim is not an agreement between the parties, but an equitable duty to pay. A contract implied in law is not technically a contract at all, but is a "non-contractual obligation that is treated procedurally as if it were a contract." 25 Wash. Prac., Contract Law and Practice § 1.16. The obligation to pay is imposed by law, not by the defendant's agreement to enter into a contract; it is imposed to prevent the defendant from being unjustly enriched by services provided in the absence of a contract for which the plaintiff deserves, and expected, payment. *Id.* The plaintiff recovers in "quantum meruit," which is the court's determination of the reasonable value of the services provided. *See Heaton*, 608 P.2d at 632-33 (describing the doctrine of "quasi contract").

In fashioning quantum meruit relief, the court – like the federal payphone regulations – would be setting a default value for the services that Plaintiff provided. Plainly, an award of quantum meruit that assigned a different default value for payphone calls would be inconsistent with the federal regulations and therefore preempted. Recognizing this potential problem, Defendant argues that Plaintiff's quasi-contract claim is preempted because a court *could* assign not only a different rate of

compensation, but also "payment for calls that are not compensable and assignment of liability to the wrong entity."

But it is not clear that the mere possibility of an inconsistent award should preempt Plaintiff's claim as it was pleaded in the original complaint. In its original complaint, Plaintiff explicitly assigned a value of 24 cents per call to those uncompensated services – the same value assigned by the federal regulation, 47 C.F.R. § 64.1300(d). In its amended complaint, Plaintiff reworded the claim to seek "the reasonable value of the economic benefits conferred on Defendant[]," but Plaintiff represented in its brief and at argument before this court that it would be seeking, under state law, exactly the same rate of compensation for the same calls as it would be entitled to receive under the federal regulations. Moreover, as did the court in *Precision Pay Phones v. Qwest Communications Corp.*, the district court here assumed that 47 C.F.R. § 64.1300 would control the valuation of the services in the quantum meruit claim. *See* 210 F. Supp. 2d 1106, 1118 (N.D. Cal. 2002) (stating that, "*[h]ad the FCC regulation not set a default rate*, Plaintiff would be free to prove under state law the value of the service" (emphasis added)), *disapproved on other grounds by Greene*, 340 F.3d at 1051 n.4. In fact, in distinguishing its own quasi-contract counterclaim, even Defendant has suggested that a claim is not preempted if it "relies *exclusively* on the existence of the FCC's regulations." Insofar as Plaintiff's claim relies exclusively on the regulations, we cannot say that it is "inconsistent" with the federal regulations. *See Bates*, 125 S. Ct. at 1804 (noting that district can instruct the jury on the relevant federal standards in order to ensure that the state claim remains consistent with federal regulations).

A "hypothetical conflict is not a sufficient basis for preemption." *Total TV*, 69 F.3d at 304; *see also Ishikawa*, 343 F.3d at 1132 ("LabOne argues . . . that state tort law *could* be inconsistent with federal regulations. LabOne, however, makes no attempt to show that anything about the state law applied in this case actually *was* inconsistent. . . . The district court invited and the plaintiff urged that the jury use the federal requirements to evaluate whether LabOne performed its duties with due care."). As in those cases, the mere possibility of inconsistent remedies is insufficient to require preemption of all quasi-contract or "implied in law" claims.

Our answer would be different if § 276(c) gave the Commission *exclusive* authority to regulate rates or other terms of payphone compensation, making preemption complete. Indeed, in situations of complete preemption it has been suggested that claims for recovery in quantum meruit would be preempted from the outset. For example, a statute providing that "no State or local government shall have any authority to regulate . . . the rates charged by" cellular telephone providers, 47 U.S.C. 332(c)(3)(A), has been held to preempt any claim that would require a court to set a reasonable rate or to assess the reasonableness of rates charged. *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073-74 (7th Cir. 2004) (citing *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021, 17,035 (Aug. 14, 2000)); *see also AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) (noting that the FCC had "strongly suggest[ed] that a claim based on *quantum meruit* would be preempted" by § 332(c)(3)(A)) (citing *Petitions of Sprint PCS & AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 F.C.C.R. 13,192, 13,198 n.40 (2002)). Similarly, we have held that,

because the Federal Energy Regulatory Commission has "exclusive authority to determine the reasonableness of wholesale rates," a plaintiff's claim was preempted insofar as it "require[d] the district court, at some point, to determine the fair price of the electricity that was delivered under the contract." *Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 647-48 (9th Cir. 2004).

Those cases differed from the present case in that regulation of rates by state and local entities was absolutely barred. Here, by contrast, only "inconsistent" state requirements are barred. As stated originally, Plaintiff's quasi-contract claim sought recovery for unjust enrichment in the exact amount that it was entitled to be paid under the federal regulations and, consequently, would not require the district court to determine a reasonable price, let alone to set an "inconsistent" price. Thus, we affirm the district court's decision to deny judgment on the pleadings on this claim.

c. *Negligence*

A negligence claim, in Washington, requires proof of a duty, a breach of duty, a resulting injury, and proximate cause between the breach and the injury. *Hutchins v. 1001 Fourth Ave. Assocs.*, 802 P.2d 1360, 1362 (Wash. 1991). Here, Plaintiff seeks to enforce Defendant's duty, created by "applicable orders and regulations" of the Commission, to track calls placed from Plaintiff's payphones and to provide the tracking information to Plaintiff in order to help it pursue collection from other responsible carriers. *See, e.g.*, 47 C.F.R. § 64.1310(c)(1) (requiring each "Intermediate Carrier" to provide quarterly reports containing particular information about "all the facilities-based long

distance carriers to which the Intermediate Carrier switched toll-free and access code calls dialed from each of that payphone service provider's payphones").

For breach of that duty, Plaintiff seeks to recover all damages caused by its inability, in the absence of the necessary tracking information, to pursue collection from other carriers. Granting Plaintiff's requested relief would make Defendant financially liable for calls other than those for which the regulations make it responsible. In this circumstance, we agree with Defendant that Plaintiff's negligence claim is preempted.

In enacting the payphone regulations, the Commission's primary purpose was to create a system for compensation. *See* 47 U.S.C. § 276(b)(1)(A) (directing the Commission to adopt a "compensation plan"). As we stated above, a primary objective – and a primary difficulty – for the Commission has been to settle confusion over which carrier is responsible for payment when more than one carrier handles a call. *See 2003 Payphone Order*, 18 F.C.C.R. at 19,976, ¶ 2 ("These rules satisfy section 276 by identifying the party liable for compensation and establishing a mechanism for PSPs to be paid."); *APCC Servs.*, 20 F.C.C.R. 2084, ¶ 25 (refusing to accept an argument that "conflicts with the Commission's reasoned decision to place responsibility on facilities-based carriers only"). Here, imposing a duty that may make carriers liable for calls for which other carriers are responsible would be inconsistent with the Commission's careful assignment of liability.

We do not hold that state law remedies – for example, damages for breach of an express contract relating to payphone services – would be preempted simply because

they provide recovery in amounts more than the contractual or default per-call amount. *See Bates*, 125 S.Ct. at 1800-01 (holding that an additional remedy does not constitute an additional "requirement"). Here, however, where Plaintiff seeks to impose liability under state law by shifting to Defendant the payment obligations of a carrier other than Defendant, we hold that its claim is inconsistent with the federal system and therefore preempted by § 276(c). We accordingly reverse the district court's decision to grant Plaintiff leave to amend its complaint to add a negligence claim.

3. *Conclusion*

The Commission's regulations reveal an intent to create predictability in payphone compensation, but they do not require uniformity at the level that Defendant asserts, at least with respect to rates and methods of payment. The regulations contemplate that parties will enter into mutually acceptable agreements that automatically override the Commission's prescriptions, and state contract law must have a role in regulating those agreements. Nothing in § 276 or the Commission's regulations precludes state common law actions to enforce obligations identical to those set forth in the Commission's regulations. Because, as the Commission states in its amicus brief, claims for compensation "involve largely factual questions" and any policy issues that do arise can be referred to the Commission under the doctrine of primary jurisdiction, we see little danger of inconsistent administration of federal policy. *See Precision Pay Phones*, 210 F. Supp. 2d at 1119 ("The federal ingredient involved here – the setting of the per call dial-around rate in the absence of a contract – requires no interpretation of federal law.

Hence, there is no compelling need for a federal forum to *e.g.* facilitate national uniformity in the interpretation or application of federal law." (footnote omitted)).

Therefore, we affirm the district court's decision to deny judgment on the pleadings as to Plaintiff's claim for quantum meruit. We also affirm the court's decision to allow Plaintiff to add a claim for breach of contract implied in fact, but we reverse the decision as to Plaintiff's negligence claim, which seeks to impose liability in a manner inconsistent with the federal payphone regulations.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., et al., Defendant(s).	No. C03-0694P ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFF'S MOTIONS TO AMEND
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. SOUTHWESTERN BELL COMMUNICATION SERVICES, INC., and WILTEL COMMUNICATIONS, INC., Defendant(s).	No. C03-0809P
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. VARTEC TELECOM, INC., Defendant(s).	No. C03-0811P

This matter comes before the Court on several nearly identical motions in three related cases. Plaintiff

Metrophones Telecommunications Services, Inc. ("Metrophones"), a "payphone service provider," has brought three lawsuits against four long distance phone service carriers, Global Crossing Telecommunications, Inc., Southwestern Bell Communication Services, Inc., Wiltel Communications, Inc., and Vartec Telecom, Inc. The cases were originally assigned to three different district judges, but the later two were reassigned to Judge Marsha Pechman on the Court's own motion as related to C03-0694P, as all three cases present substantially similar legal issues. In each of the cases, Metrophones originally asserted a private right of action under Section 276 of the Telecommunications Act of 1996 and the common law cause of action of quantum meruit. The Ninth Circuit then declared that no such private right of action exists, and each of the defendants in these cases moved to dismiss the § 276 claims on this ground, and to dismiss the quantum meruit cause of action as preempted. *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). Also in each case, plaintiff Metrophones has moved to amend the complaints to include federal causes of action under three other sections of the Telecommunications Act, as well as two other common law causes of action. Defendants oppose the amendments, contending that such amendment would be futile. Having reviewed the papers and pleadings submitted by the parties, the Court hereby GRANTS the defendants' motions to dismiss as to the § 276 claims, but denies those motions as to quantum meruit, as the Court does not view those claims as preempted. In addition, the Court GRANTS the motions to amend, as a private right of action will be allowed under two of the three sections of the Act, and the common law causes of action are not preempted. As these cases involve two controlling questions of law that present novel issues

in the Ninth Circuit, the Court will entertain a proper motion for certification of interlocutory appeal under 28 U.S.C. § 1292(b).

BACKGROUND

Plaintiff Metrophones is a "payphone service provider" that owns and operates public payphones. Metrophones brings these lawsuits against Global Crossing Telecommunications, Inc. ("Global Crossing"), Southwestern Bell Communication Services, Inc. ("Southwestern Bell"), Wiltel Communications, Inc. ("Wiltel"), and Vartec Telecom, Inc. ("Vartec"), which are interexchange (long distance) carriers, for an alleged failure to pay compensation for coinless payphone calls made using Metrophones' payphones.

Payphone service providers ("PSPs") such as plaintiff are compensated for the use of their payphones in two primary ways, either through direct payment by the caller by insertion of coins into the payphone, or "commission payments" from the PSP's "presubscribed carrier," the carrier to which operated-assisted calls are automatically routed. Compl. at 3. Yet calls are also made without utilizing either of these compensation methods, namely credit card (access code) calls and toll-free calls (collectively "coinless" calls). *Id.* For these calls, the caller pays the interexchange (long distance) carrier, but there is no direct means by which the PSP is compensated. *Id.*

In enacting the Telecommunications Act of 1996, Congress restructured and deregulated much of the local telephone industry. Relevant to the present lawsuit,

Section 276 of the Act was aimed at promoting competition in the payphone service industry.[1] That section prohibits "any Bell operating company that provides payphone service" from discriminating in favor of its own payphone service. 47 U.S.C. § 276(a). It also directs the Federal Communications Commission to promulgate regulations that:

> (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.

Id. at § 276(b)(1)(A).

To that end, the FCC has promulgated regulations and has issued orders requiring long distance carriers and local carriers to compensate PSPs on a per call basis for calls made using their payphones. 47 C.F.R. § 64.1300 (2003).[2] Specifically, the FCC now requires that the "completing carrier" (the interexchange or local carrier that

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[1] An in depth background of the Act and its history is set forth in *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

[2] The regulations were substantially revised by the Commission's order of October 3, 2003, which switches the obligation to pay from the "first interexchange carrier" to the "completing carrier," and included local exchange carriers in the definition. *In the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Dkt. No. 96-128, 2003 WL 22283556, 30 Communications Reg. (P&F) 609, F.C.C. (Oct 03, 2003). The Court does not perceive the changes in the regulations to affect the resolution of the issues presented in the motions before it.

completes a coinless call) must compensate the PSP at a rate agreed upon by the parties. *Id.* at § 64.1300(b). In the absence of such an agreement, the rate is twenty-four cents per call. *Id.* at § 64.1300(d). Further, it is the duty of the completing carrier to track the calls in order to ensure adequate compensation. *Id.* at § 64.1310(a).

After implementation of these regulations, several PSPs (including plaintiff Metrophones) brought an action against Sprint Communications Company for alleged underpayment of per call compensation owed under the regulations. Prior to the defendant even being served, the district court sua sponte dismissed the action on the ground that while § 276 authorized the FCC to promulgate regulations, it did not create an express or implied private right of action based on those regulations. The Ninth Circuit affirmed that decision in the absence of a defendant, holding that § 276 directs the FCC to establish a *plan* for compensation, but does not create a *right* to compensation. *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). Although §§ 206 and 207 of the Act create liability for "violations" of the "provisions of this chapter" and a right to sue by persons damaged by such violations, the court reasoned that § 267 did not itself create a duty that one could "violate." *Id.* The court concluded that, unlike some other sections of the Act (i.e. 227(b)(3)(A)), § 267 did not establish a right to sue for violations of its corresponding regulations. *Id.* It appears that plaintiffs in that case did allege a common law quantum meruit cause of action as well, but this was not addressed by the court, and easily could have been dismissed on the basis of lack of subject matter jurisdiction.

Defendants now bring motions to dismiss,[3] arguing that plaintiff's § 267 cause of action has been rendered moot by the *Greene* decision, and that plaintiff's claim for quantum meruit is preempted by the Telecommunications Act, § 276(c). Plaintiff responds by arguing that the Court should hold in abeyance the motions to dismiss as they relate to the § 276 private right of action in order to allow the plaintiffs in *Greene* to file for a writ of certiorari. Plaintiff further argues that the quantum meruit claim is not preempted. Finally, plaintiff moves to amend the complaints to include both new theories of private right of action under the Act, and two other state common law causes of action. Defendants oppose the motions to amend on futility grounds, saying that an end run around *Greene* should not be allowed, and that each of the other state law claims is likewise preempted.

ANALYSIS

A. Private Right of Action Under § 276

Plaintiff argues that despite the clear mandate from the Ninth Circuit that there is no private right of action under § 276 or its regulations, this Court could refuse to "immediately implement the narrow holding of the three-judge panel in *Greene*," and hold the matter in abeyance until after it is determined whether the Supreme Court will grant a writ of certiorari on the issue, which plaintiff's counsel in the *Greene* case plans to file soon.

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[3] Defendant Global Crossing has styled its motion as a motion for judgment on the pleadings, but its arguments are identical to those presented in the other two cases.

The parties agree that *Greene* is the governing law in the present case, and also recognize that the filing of a petition for certiorari does not change the binding effect of the Ninth Circuit's decision on this Court. While plaintiff argues that the Ninth Circuit made the wrong decision in *Greene*, there is no authority for this Court to simply ignore it. *See Yong v. INS*, 208 F.3d 1116, 1119 n. 2 (9th Cir. 2000); *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d, 923, 924 (9th Cir. 1983). Yet plaintiff asks the Court to do just that, based on its assertion that "the law in this area is not settled and because the *Greene* decision is still being appealed." Yet the Ninth Circuit has already denied a petition for rehearing en banc. Further, this Court does not presume to know, nor will it hazard a guess, as to what the U.S. Supreme Court will or will not do if presented with a petition for certiorari. What is certain, is that *Greene* is the current controlling law of the Ninth Circuit, and that is the law this Court must follow. The Ninth Circuit has definitively decided the issue, the motion is ripe for decision, and plaintiff's claim for a private right of action under § 276 is dismissed.

B. Preemption of State Law Claims Under § 276(c)

Federal preemption of state law originates from the Supremacy Clause of the Constitution, which invalidates laws that "interfere with or are contrary to federal law." *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995) (internal quotations omitted). The rule regarding preemption is easy to state, yet tricky to apply – "'[t]he purpose of Congress is the ultimate touchstone' of the preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). There are three basic

situations in which preemption of state law occurs: (1) express preemption, where a federal statute specifically defines its preemptive force; (2) implied, or "field" preemption, where federal regulation of an area of the law is so complete that there is no room for state regulation to occur; and (3) conflict preemption, where compliance with both federal and state requirements would be impossible. *See Hillsborough County, Fla. v. Automated Medical Labs.*, 471 U.S. 707, 712-13 (1985). In addition, a cause of action may be said to "arise under" federal law "if the right to relief under" state law "requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Board of State of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 13 (1983).

The present cases involve a question of express preemption. In such a case, "the task of statutory construction [of an express preemption clause] must in the first instance focus on the plain wording of the clause, which necessarily entails the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) *quoting CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Section 276(c) of the Telecommunications Act of 1996, 47 U.S.C. § 276(c) provides:

> (c) State Preemption
>
> To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matter shall preempt such State requirements.

The preemptive scope of this provision is relatively narrow. *Compare Morales v. Trans World Airlines*, 504 U.S.

374, 383-84 (1992) (recognizing broad preemptive effect of Airline Deregulation Act that preempts state laws "relating to" air carrier rates, etc.) *with CSX Transportation. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (preemptive force of federal regulations "covering the same subject matter" viewed as narrow). When Congress intends broad preemptive force, it certainly knows how to provide for it.

While the express preemption clause of § 276 has yet to be interpreted by the Ninth Circuit, it is very similar in scope to the one interpreted in *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995). There, the court was interpreting federal statutes regulating cable television, which included a provision stating that "no . . . state may regulate the rates for the provision of cable services except to the extent provided under this section and section 532 of this title." *Id.* at 301 and n. 4. The defendant argued that plaintiff's causes of action brought under the state's general unfair business practices act were preempted by the federal cable acts. The Ninth Circuit disagreed, finding that there was nothing inconsistent between the cable acts and the general state statute. *Id.* at 302. The court held that by using the language "regulate the rates," Congress had signaled its intent to limit preemption under the Cable Acts. *Id.*

The language at issue in § 276 is even narrower. In passing the Telecommunications Act of 1996, and in particular in enacting § 276, Congress provided a very narrow preemptive scope – one that is only invoked when "state requirements are inconsistent with the Commission's regulations." There is nothing inconsistent between the regulations promulgated pursuant to § 276 and the common law doctrine of quantum meruit. In fact, the purpose of each are entirely consistent. The regulations

were promulgated in order to "promote competition among payphone service providers and [to] promote the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1). The doctrine of quantum meruit is an equitable one, serving to prevent the unjust enrichment of the defendant in the absence of an enforceable contract by forcing compensation to the plaintiff in an amount equal to the value of the benefit conferred on the defendant. *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 680, 681 P.2d 1312 (1984). Competition is fostered by a level playing field, one on which there is equity. The purposes of the regulations and the doctrine of quantum meruit are aligned.

This result is also consistent with the statute's "savings clause," which states generally that "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. Though it is true that clauses such as these are ineffective if a state law is nevertheless in conflict with a federal statute or regulation, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (doctrine of conflict preemption applies even in face of savings clause), such is not the case here. Nothing in § 276 indicates that Congress intended the regulations to provide the sole remedy regarding collection of monies owed to payphone service providers. Congress only intended to eliminate *inconsistent* state requirements.

Finally, plaintiff's quantum meruit cause of action should not be considered to "arise under" federal law as involving a "substantial question of federal law." "The fact that a case may turn in part upon the resolution of some issue of federal law or that federal law constitutes an ingredient of the state law claim for relief does not

automatically convert a state claim" into a federal one. *Precision Pay Phones v. Qwest Communications Corp.*, 210 F. Supp. 2d 1106, 1117 (N.D. Cal. 2002). In the present case, resolution of the state law cause of action for quantum meruit will not involve a substantial federal question. The FCC regulations in this case establish an obligation to pay on a per call basis and define a rate in the absence of a contract between the parties. Quantum meruit, under Washington law, is a remedy to compensate a plaintiff for the reasonable value of services rendered where retention of that value would be unjust. *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 664, 683, 828 P.2d 565 (1992). Thus the only point at which the state law claim and the federal regulations connect is in establishing the reasonable value of the payphone services provided to the carriers. This does not involve resolution of a substantial federal question.

For each of the above reasons, the Court holds that the plaintiff's state law cause of action for quantum meruit is not preempted.

C. Motion to Amend Complaint

Plaintiff also moves to amend the complaints to include additional federal causes of action under three other provisions of the FTA and state law causes of action for implied contract and negligence.

Leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Motions to amend are typically granted provided that the amendment will not unduly prejudice the opposing party, is not sought in bad faith, will not cause undue delay, and does not constitute an exercise in futility. *DCD Programs, Ltd. v.*

Leighton, 833 F.2d 183, 186 (9th Cir. 1987). Defendants oppose amendment of the complaints in these cases on the ground that the new alleged causes of action would not survive a motion to dismiss under Rule 12(b)(6) and would therefore be futile.

Plaintiff's amended complaints state three new theories of liability and private right of action. Specifically, plaintiff would like to amend in order to state a cause of action under § 201(b) of the Act, which ostensibly requires that all charges, practices, classifications, and regulations be "just and reasonable." Next, plaintiff argues that the regulations and "orders" issued pursuant to the FCC's rulemaking authority should be considered "orders for payment of money" as the term is used in § 407, which allows private parties who were the intended beneficiaries of the order to file suit against a party that has failed to comply with that order. Plaintiff also argues that § 416(c) establishes a duty to comply generally with orders of the Commission. None of these statutory provisions were at issue or addressed by the Ninth Circuit in *Greene*. Finally, plaintiff asks for leave to amend to include two more state common law causes of action for implied contract and negligence.

1. Section 201(b)

Section 201(b) of the Act provides that

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable *is declared to be unlawful.*

47 U.S.C. § 201(b) (emphasis added). Meanwhile, § 206 states that:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or *declared to be unlawful*, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby . . .

47 U.S.C. § 206 (emphasis added). Finally, § 207 establishes the private right of action:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recover of the damages for which such common carrier may be liable *under the provisions of this chapter*, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207 (emphasis added).

In interpreting the above statutory provisions, the D.C. Circuit has held that a common carrier's failure to comply with a Commission "rate of return prescription" constituted a "per se violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates" under § 201. *MCI Telecommunications Corp. v. F.C.C.*, 59 F.3d 1407, 1413-14 (D.C. Cir. 1995). This rationale was used to allow a § 201(b) cause of action for violations of the regulations promulgated under § 276 in *APCC Services, Inc. v. Cable & Wireless, Inc.*, 281 F.Supp. 2d 52, 58 (D.D.C. 2003).

The Court finds this authority persuasive. Although § 276 may not in and of itself provide for a private right of action, § 201 declares unreasonable practices to be unlawful. The Court finds that failure to comply with Commission regulations would per se be an unreasonable practice, and therefore violative of § 201. Since §§ 206 and 207 allow a private right of action for acts declared unlawful under the provisions of this chapter, plaintiff may state a cause of action for unreasonable practices under § 201.

The Court is further persuaded by the FCC's recent determination that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act" *In the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Dkt. No. 96-128, 2003 WL 22283556, 30 Communications Reg. (P&F) 609, F.C.C. (Oct 03, 2003). This agency interpretation of the statute is entitled to substantial deference, as the precise issue of whether a violation of the Commission's regulations on PSP compensation would be a violation of § 201 is not specifically addressed by the language of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, this Court will allow amendment of the complaints to include a cause of action under § 201(b).

2. Section 407

Section 407 of the Telecommunications Act provides that:

> If a carrier does not comply with an *order for the payment of money* within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the *findings and order of the Commission shall be prima facie evidence of the facts therein stated*, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.

47 U.S.C. § 407 (emphasis added). This provision, of course, must be read in the context of the entire statute. As explained above, § 207 allows a person to attempt to recover damages by *either* filing a complaint with the Commission or filing a suit for damages in district court. The sections that follow establish various procedures, including procedures for filing a complaint before the Commission (Section 208) and for issuance of "orders for payment of money" (Section 209). Section 407 then gives a person the right to bring an action in district court where a carrier does not comply with an "order for the payment of money."

The Court reads the term "order for the payment of money" as a term of art. Section 407 gives an [sic] means of enforcement against carriers who do not abide by the Commission's orders for the payment of money. It is clear from §§ 208 and 209 that such orders are made after a petition is filed by a complainant and an investigation is

carried out. The order then directs a specific carrier to pay money "*to the complainant*" (emphasis added) and must give a time period for compliance. Whether or not this is an "order" in the sense of an "adjudication" under the Administrative Procedures Act is unclear. But what is clear is that the Telecommunications Act itself provides a distinct procedure for the issuance of an "order for the payment of money" and its enforcement.

In the present case, plaintiff is not asking this Court to enforce an "order for the payment of money" that was issued by the Commission. Instead, it is asking for a remedy pursuant to rulemaking orders. Those rulemaking orders may address issues of compensation, but they are not "orders for the payment of money" as is contemplated under §§ 209 and 407. Plaintiff's motions to amend are therefore DENIED with regard to the cause of action under § 407.

3. Section 416(c)

Section 416 is entitled "Orders of Commission." Relevant to the present case is § 416(c), which decrees that "[i]t shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with *such orders* so long as the same shall remain in effect."

Unlike the "orders for payment of money" described in the above section, this section refers generally to "orders." There is no indication that this term is to be construed as "adjudications" as set forth in the Administrative Procedures Act. In fact, it appears that where Congress wanted to adopt the APA definition of "orders," it specifically did so. *See* 47 U.S.C. § 409. The Ninth Circuit has expressly

held that the APA definition should not be imported into the statute unless specifically stated. *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1271 (9th Cir. 1987) (interpreting Section 401 of the Telecommunications Act). Neither does the statute itself provide any guidance as to what an "order" would entail. The Court does not, therefore, read the term to be so narrow. *APCC Services, Inc. v. Cable & Wireless, Inc.*, 281 F.Supp. 2d 52, 58 (D.D.C. 2003). Amendment of the complaints is therefore granted with regard to plaintiff's proposed § 416(c) cause of action.

4. Proposed State Law Claims

Plaintiff also moves to amend the complaints to include other state common law causes of action. For all of the same reasons stated above, the Court finds that plaintiff's state law claims of implied contract and negligence are not preempted by § 276(c) and the Commission's regulations. The amendment as to these claims will be allowed.

D. Interlocutory Appeal

Title 28, Section 1292(b) allows for interlocutory appeals as an exception to the general rule that only "final" orders are appealable. That provision provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a *controlling question of law* as to which there is *substantial ground for difference opinion* and that an immediate appeal from the order may *materially advance the ultimate termination*

> *of the litigation*, [she] shall so state in writing in such order.

28 U.S.C. § 1292(b) (emphasis added). Either the district court or the court of appeals may stay the case pending resolution of the appeal.

It appears that the present cases involve two issues of novel and controlling law as to which there is a substantial ground for difference of opinion, the first regarding alternative private rights of action under the Telecommunications Act for violations of regulations promulgated under § 276, the other regarding the preemptive scope of § 276(c). Thus, the Court will entertain a properly brought motion pursuant to 28 U.S.C. § 1292(b).

CONCLUSION

The Court holds that plaintiff's claims brought under § 276 of the Telecommunications Act against the various defendants in these cases must be dismissed under the Ninth Circuit's decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). However, plaintiff's claims for quantum meruit shall stand, as those claims are not preempted by the relatively narrow express preemption provision set forth in § 276(c) of the Act. Next, the Court finds that amendments to the complaints in these cases that assert causes of action under §§ 201(b) and 416(c) shall be allowed, as such amendments would not be futile. A cause of action under § 407, however, shall not be allowed. Finally, plaintiff's supplemental claims for two additional common law causes of action shall be allowed as well as they are not preempted by § 276(c).

The Clerk is directed to send copies of this order to all counsel of record. Dated: December 16, 2003.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., et al., Defendant(s).	No. C03-0694P ORDER GRANTING MOTIONS FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. SOUTHWESTERN BELL COMMUNICATION SERVICES, INC., and WILTEL COMMUNICATIONS, INC., Defendant(s).	No. C03-0809P
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. VARTEC TELECOM, INC., Defendant(s).	No. C03-0811P

This matter comes before the Court on several nearly identical motions in three related cases. Plaintiff Metrophones Telecommunications Services, Inc. ("Metrophones"), a "payphone service provider," has brought three lawsuits against four long distance phone service carriers, Global Crossing Telecommunications, Inc., Southwestern Bell Communication Services, Inc., Wiltel Communications, Inc., and Vartec Telecom, Inc. The cases were originally assigned to three different district judges, but the later two were reassigned to Judge Marsha Pechman on the Court's own motion as related to C03-0694P, as all three cases present substantially similar legal issues. In each of the cases, Metrophones originally asserted a private right of action under Section 276 of the Telecommunications Act of 1996 and the common law cause of action of quantum meruit. The Ninth Circuit then declared that no such private right of action exists, *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003), and each of the defendants in these cases moved to dismiss the § 276 claims on this ground, and to dismiss the quantum meruit cause of action as preempted. Also in each case, plaintiff Metrophones moved to amend the complaints to include federal causes of action under three other sections of the Telecommunications Act, as well as two other common law causes of action. Defendants opposed the amendments, contending that such amendment would be futile. The Court granted the defendants' motions to dismiss as to the § 276 claims, but denied those motions as to quantum meruit, as the Court did not view those claims as preempted. The Court also granted the motions to amend, allowing a private right of action under two of the three sections of the Act, and finding that the common law causes of action are not preempted. As these cases involve two controlling questions of law that present novel issues

in the Ninth Circuit, the Court stated that it would entertain motions for certification of interlocutory appeal under 28 U.S.C. § 1292(b). Each of the defendants has brought such a motion, and plaintiff has not opposed those motions.

Title 28, Section 1292(b) allows for interlocutory appeals as an exception to the general rule that only "final" orders are appealable. That provision provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a *controlling question of law* as to which there is *substantial ground for difference* [sic] *opinion* and that an immediate appeal from the order may *materially advance the ultimate termination of the litigation,* [she] shall so state in writing in such order.

28 U.S.C. § 1292(b) (emphasis added). Either the district court or the court of appeals may stay the case pending resolution of the appeal.

The Court's December 16, 2003, order involved two controlling questions of law, namely (1) whether a private right of action exists under Sections 201(b), 407, and/or 416(c) of the Telecommunications Act for violations of regulations promulgated under Section 276 of the Act; and 2) whether Section 276(c) of the Act preempts state law claims, including quantum merit, negligence, and implied contract. These appear to this Court to be novel issues in the Ninth Circuit on which there is substantial ground for difference of opinion, in particular in light of the Ninth Circuit's decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). This Court also has no doubt that an immediate appeal from this order will

materially advance the ultimate termination of the litigation. It is in the interests of judicial economy to have these issues resolved prior to proceeding with the litigation, in particular because they go directly to whether plaintiff even has a cause of action and this Court's jurisdiction. The Court's order of December 16, 2003, is therefore certified to the Ninth Circuit Court of Appeals for interlocutory appeal. The cases will be stayed during the pendency of this appeal.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: January 12, 2004.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

(2)

No. 05-705

Supreme Court, U.S.
FILED
JAN 3 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 201(b) of the Communications Act of 1934 creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

2. Whether 47 U.S.C. § 276 of the Communications Act of 1934 preempts state law claims for *quantum meruit* and breach of implied contract based on a long distance carrier's alleged failures to compensate a payphone service provider for coinless payphone calls.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondent Metrophones Telecommunications, Inc. ("Metrophones") makes the following disclosure: Metrophones is privately held. As a result, no publicly held company owns 10% or more of the company's stock.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Metrophones Telecommunications, Inc. ("Metrophones") respectfully submits that this Court should deny the petition for certiorari filed by Global Crossing Telecommunications, Inc. ("Global Crossing") for the reasons outlined below.

OPINIONS BELOW

Petitioner Global Crossing attached the opinions below to its petition. The Ninth Circuit's opinion below was recently published at 423 F.3d 1056. The relevant opinion of the district court is unpublished and is reproduced at App. 14a-33a.

JURISDICTION

Petitioner Global Crossing properly stated the bases for this Court's jurisdiction.

RELEVANT STATUTORY PROVISIONS

Petitioner Global Crossing listed the relevant statutory provisions with the exception of 47 U.S.C. § 414, the savings clause in the Communications Act of 1934.

47 U.S.C. § 414 provides in relevant part: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

STATEMENT OF THE CASE

Metrophones brought this small collections action in March of 2003. In its Complaint, Metrophones sought to

collect only $31,330.42 for uncompensated telephone calls.[1] App. 13a. Global Crossing paid Metrophones for some of the coinless calls placed from Metrophones' payphones, but has refused to pay Metrophones for all coinless calls that were placed from Metrophones' payphones and routed over Global Crossing's network.

In December of 2003, The Honorable Marsha J. Pechman of the United States District Court for the Western District of Washington issued an order permitting Metrophones to amend its complaint to add a cause of action under 47 U.S.C. § 201(b), as well as state law causes of action for *quantum meruit*, implied breach of contract, and negligence. App. 14a-3ea.

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[1] At page 4 of its petition, Global Crossing misstates the facts of the current controversy in two respects. First, Metrophones filed its complaint in March of 2003 and not "[i]n late 2001," as Global Crossing claims. App. 11a. Second, Global Crossing incorrectly claims that Metrophones sought a judgment requiring it to conduct an accounting of amounts owed "since the second quarter of 1999." Petition at p. 4. The truth is that (1) Metrophones did not assert an accounting cause of action in this case; and (2) because of Global Crossing's bankruptcy filing, the unpaid calls at issue in this case begin on January 28, 2002. App. 13a. Indeed, all of the calls at issue in this case were placed during the so-called "toll gate era," when the first facilities-based interexchange carrier (here, Global Crossing) was responsible for all completed calls routed to it by the local exchange carrier. *The Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996, Second Order on Reconsideration,* 16 F.C.C.R. 8,098 (2001) at ¶¶ 1-2.

On the issue of Metrophones' cause of action under 47 U.S.C. § 201(b), Judge Pechman merely held that "[s]ince §§206 and 207 allow a private right of action for acts declared unlawful under the provisions of this chapter, plaintiff may state a cause of action for unreasonable practices under § 201." App. 27a. In reaching her decision, Judge Pechman relied, in large part, on the FCC's *2003 Payphone Order*.[2] In that Order, the FCC specified that a carrier's "failure to pay [dial-around compensation] in accordance with the Commission's pay phone rules...constitutes...an unjust and unreasonable practice in violation of section 201(b) of the Act." 18 F.C.C.R. at 19,990, ¶32.

The Ninth Circuit, in affirming Judge Pechman's ruling on the existence of a private right of action under section 201(b), confirmed that this Court's *Chevron* framework applied to the FCC's *2003 Payphone Order*. The Ninth Circuit acknowledged that "the statement in the *2003 Payphone Order* arose in the context of a complex decision about the operation of the whole system of payphone regulation." 423 F.3d at 1066. The Court also noted that it was in the context of "adopting the final rules in the *2003 Payphone Order*, [that] the Commission relied on the availability of actions for damages under §§ 206 and 207." *Id.* In the spirit of this Court's holding in *Brand X*, the Ninth Circuit "defer[red] to the Commission's reasonable, authoritative interpretation of § 201(b) and [held] that a private right of action is available to remedy the unjust and unreasonable practice of failing to pay PSPs according to the Commission's regulations." *Id.* at 1070.

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2 *Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, 18 F.C.C.R. 19,975 (2003) ("*2003 Payphone Order*").

REASONS FOR DENYING THE PETITION

Metrophones believes that this Court should deny Global Crossing's petition for three reasons. First, if there is a conflict between circuit courts, it is a relatively insignificant conflict over the applicability of *Chevron* deference to a statutory analysis performed by the FCC. This Court took up—and resolved—that same issue six months ago in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688 (2005) ("*Brand X*"). Second, there is no qualifying conflict over the preemption issues that the Ninth Circuit decided in the case below. Third, the lawsuit that Metrophones filed against Global Crossing was for the payment of only $31,330.42. Given the relatively small amount in controversy, this Court should not further delay Metrophones' effort to get to the merits of its claim against Global Crossing.

A. The Only Conflict Between Circuit Courts Is Over The Deference Required Under *Chevron*—An Issue That This Court Addressed Earlier This Year.

While it is true that the Circuit Court for the D.C. Circuit recently held—in the case of *APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238 (D.C. Cir. 2005) ("*APCC*")—that 47 U.S.C. § 201(b) did not create a private right of action in favor of a payphone service provider, the Ninth Circuit's decision to the contrary does not create a conflict that warrants this Court's intervention. Indeed, if there is a conflict between the *APCC* decision and the decision of the Ninth Circuit below, that conflict came about because the D.C. Circuit issued its opinion in *APCC* only one day after this Court decided the *Brand X* case. Because of that timing (the D.C. Circuit presumably had already

completed its opinion in *APCC* when this Court issued *Brand X*), the D.C. Circuit did not mention *Brand X*—or, for that matter, the FCC's *2003 Payphone Order*[3]—in reaching its decision on the Section 201(b) issue.[4]

In *Brand X*, the FCC had concluded that cable companies selling broadband Internet service were not providing a "telecommunications service[e]" as the Communications Act defines that phrase. This Court—applying the analytical framework outlined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—held that "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute ...." 125 S.Ct. at 2699.

In *Brand X*, this Court determined that *Chevron* deference is appropriate if (1) the relevant statutory language is ambiguous; and (2) the administering agency's statutory

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[3] The majority in the *APCC* case did not even acknowledge the existence of the FCC's *2003 Payphone Order*. Indeed, the D.C. Circuit's determination that the FCC had not spoken on the existence of a private right of action under § 201(b) of the Act is inexplicable, given the *2003 Payphone Order*. As the dissent in *APCC* pointed out, the majority was able to say that "'[t]here was no authoritative interpretation of § 201(b) in this case' only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position." 418 F.3d at 1254.

[4] APCC did file a petition for rehearing based, in part, on this Court's decision in the *Brand X* case. That D.C. Circuit, however, denied that petition in November of 2005. *See* 2005 U.S.App. LEXIS 24402.

interpretation is a reasonable one. Given this legal standard, the issue before the Ninth Circuit in the case below became whether 47 U.S.C. § 201(b) unambiguously provides that a failure to pay dial-around compensation does not qualify as a "practice[]" that is "unjust or unreasonable." It does not. Section 201(b) broadly declares unlawful "[a]ll charges, *practices*, classifications, and regulations *for and in connection with ... communication service*" that are "unjust or unreasonable." 47 U.S.C. § 201(b) (emphasis added). The statute does not define the terms "practices" and "unjust or unreasonable." When, as here, the statutory terms at issue are undefined, *Brand X* confirms that the FCC had the discretion to interpret the undefined terms in order to "fill the consequent statutory gap." *Brand X*, 125 S.Ct. at 2708 ("[T]he relevant definitions do not distinguish facilities-based and non-facilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap."). In short, the FCC interpreted ambiguous statutory terms when it issued its *2003 Payphone Order* and specified, after careful consideration,[5] that "[a] failure to pay in accordance with the

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[5] In footnote one of its petition, Global Crossing repeats its mantra that the FCC determination—in the *2003 Payphone Order*—is dicta and, therefore, is not entitled to deference. That argument is unfounded. As the Ninth Circuit correctly explained, the FCC's "statement in the *2003 Payphone Order* arose in the context of the whole system of payphone regulation." 423 F.3d at 1066. In other words, the FCC's "unjust and unreasonable practice" decision was directly related to its broader determination that it should require switch-based resellers—rather than the carrier—to pay PSPs directly for reseller calls placed after July 1, 2004. As the Ninth Circuit explained, "[t]he Commission rejected the PSPs' position in part because the PSPs could recover damages from delinquent carriers in private actions." *Id.*

Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes ... an unjust and unreasonable practice in violation of section 201(b) of the Act." 18 F.C.C.R. at 19,990, ¶ 32.

The Ninth Circuit issued its opinion below approximately two months after this Court decided the *Brand X* case. Because of this timing, the Ninth Circuit—unlike the D.C. Circuit in *APCC*—incorporated and applied this Court's teachings from *Brand X*. Thus, the purported conflict upon which Global Crossing's petition is based is not a conflict at all. One circuit appropriately implemented this Court's recent gloss on the *Chevron* framework. The other—because of the timing of its decision—did not.

At its core, Global Crossing's petition is a plea for this Court to revisit the same *Chevron* deference issue that this Court addressed—in *Brand X*—only six months ago. Metrophones respectfully submits that this Court need not revisit the *Chevron/Brand X* issue at this time.

1. The Ninth Circuit's Decision Regarding the Deference Due To The FCC's 2003 Order Was Correct.

Global Crossing's challenge to the merits of the Ninth Circuit's opinion below is based almost entirely upon a suggestion that 47 U.S.C. §§ 206 and 207 permit a PSP to bring a claim for unpaid payphone compensation before the FCC, but not in a federal District Court. Indeed, at page 11 of its petition, Global Crossing argues that this Court should intervene because "the FCC is fully equipped to handle any complaints or disputes administratively." Global Crossing's argument—that PSP's may seek compensation before the FCC but not in federal District Court—is flawed for at least three reasons.

First, Section 207, which provides the statutory basis for complaints for damages for violations of the Act, could not be clearer. It states that complaints can either be brought "to the [FCC]" **or** "in any district court." 47 U.S.C. § 207. Thus, the statute itself confirms that injured parties are free to choose either forum to remedy a violation of the Act. *See Digitel, Inc. v. MCI WorldCom, Inc.*, 239 F.3d 187, 190 (2nd Cir. 2001) ("there can be no doubt that § 207 permits an injured party to seek relief either in federal court or before the FCC, but not in both"); *Stiles v. GTE Southwest, Inc.*, 128 F.3d 904, 907 (5th Cir. 1997); *Cincinnati Bell Tel. Co. v. Allnet Communications Servs., Inc.*, 17 F.3d 921, 923 (6th Cir. 1994). Given the choice provided by Section 207, there is no principled basis for any distinction that would require injured parties to proceed before the FCC, as Global Crossing maintains Metrophones must, while precluding them from proceeding before a district court.

Second, Global Crossing's logic, if accepted, would deny Metrophones and other payphone owners any forum. The statutory basis for relief before the FCC and a Federal District Court is the same—it flows from Congress' pronouncement (in Section 206) that prohibited acts are actionable. Thus, if Metrophones has no available cause of action *in federal court* under Section 206, then Metrophones would have no cause of action *before the FCC* under Section 206. The economic impact of stripping payphone owners of their right to pursue carriers that underpay would force many payphone owners out of business. Such a result, ironically, would defeat the Congressional intent—expressed in Section 276—to promote the widespread deployment of payphones and competition among payphone service providers by ensuring that they receive fair compensation for every completed call from their payphones.

Finally, Global Crossing's policy arguments are legally irrelevant. The issue before the Ninth Circuit was whether Congress intended to create a private right of action when it enacted Sections 201(b), 206, and 207—not whether that Court, as a matter of public policy, would have made the same decision. There is simply no reason to believe that Congress shared Global Crossing's view that judicial enforcement of payphone compensation requirements would intrude on matters best left to the Commission. In fact, Congress has created private rights of action in federal courts to address other issues that are far more complex than any case concerning payphone compensation. *See, e.g.*, 47 U.S.C. § 252(e)(6) (creating private right of action to seek district court review of state commission decision that interconnection agreements meet the requirements of Sections 251 and 252).

B. The Preemption Issues Decided By The Ninth Circuit Also Do Not Warrant Review.

A writ is certainly not appropriate to review the Ninth Circuit's affirmance of Judge Pechman's ruling permitting Metrophones to assert two state law claims consistent with the FCC's regulations. Review of the Ninth Circuit's decision on Metrophones' state law claims is not necessary or appropriate because the Ninth Circuit's decision on those causes of action does not meet any of the Rule 10 considerations governing review. There is no other federal appellate court that has addressed the viability of state law claims against a long distance carrier for its failure to pay dial-around compensation. State law claims were not at issue at all in the *APCC* case. *See* 418 F.3d at 1242.

The other Rule 10(a) considerations also do not apply to the Ninth Circuit's preemption analysis. The Ninth Circuit merely confirmed that Metrophones' causes of action

for *quantum meruit* and breach of contract were not preempted because only "inconsistent" state requirements are barred by 47 U.S.C. § 276(c). In the words of the Ninth Circuit below, "Plaintiff's quasi-contract claim sought recovery for unjust enrichment in the exact amount that it was entitled to be paid under the federal regulations and, consequently, would not require the district court to determine a reasonable price, let alone to set an 'inconsistent' price." 423 F.3d at 1077.

Finally, it is not true that the Ninth Circuit's preemption analysis is a decision on an important federal question that conflicts with relevant decisions of this Court. The Ninth Circuit's preemption analysis is unique to the case below. The Ninth Circuit correctly focused on the fact that "Plaintiff's quasi-contract claim sought recovery for unjust enrichment in the exact amount that it was entitled to be paid under the federal regulations...." 423 F.3d at 1077. Since only "inconsistent" state requirements are barred by Section 276(c), the Ninth Circuit correctly determined that Metrophones' state law claims were not preempted.

C. Metrophones Only Sought The Payment of Approximately $30,000.

Finally, Metrophones—a small payphone owner—sought the payment of only approximately $30,000. Global Crossing, a self-described "large company"[6] has adopted a strategy of spending tens of thousands of legal dollars to try to avoid a short trial on the simple issue of whether Global Crossing fully compensated Metrophones for calls placed from payphones owned by Metrophones.

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[6] Global Crossing's Petition at p. 17.

Since filing this small collections action in March of 2003, Metrophones has been subjected to (1) Global Crossing's motion to dismiss in the District Court; (2) Global Crossing's protracted interlocutory appeal to the Ninth Circuit; and (3) now, Global Crossing's petition to this Court for a writ of certiorari. Global Crossing's petition should be denied, among other reasons, so that the parties can proceed to a trial on the merits as soon as possible.

CONCLUSION

For the foregoing reasons, this Court should deny Global Crossing's Petition for a Writ of Certiorari.

Respectfully submitted,

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December 29, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

METROPHONES TELECOMMUNICATIONS, INC., a Washington corporation,	)	No. C03-0694P
v.	)	COMPLAINT
GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation and UNIDENTIFIED COMPANIES I THROUGH X,	)	JURY TRIAL DEMANDED

The Plaintiff above named complains of Defendants as follows:

I. INTRODUCTION AND SUMMARY OF COMPLAINT

1. Under 47 U.S.C. § 276(b)(1)(A), 47 C.F.R §§ 64.1300 et seq., and various orders of the Federal Communications Commission ("FCC") in Common Carrier Docket No. 96-128, Defendant Global Crossing Telecommunications, Inc. ("Global Crossing"), as an interexchange carrier of various types of long distance communications, is required to compensate Plaintiff, as a payphone service provider ("PSP"), at the rate prescribed by the FCC, for each and every compensable call including, but not limited to, completed access code calls and toll free calls, that has been made at any time since January 29, 2002 from a payphone owned by Plaintiff and carried over Global Crossing's telephone network facilities. Such compensation is referred to herein as "payphone compensation."

2. Many compensable calls placed from

payphones owned by Plaintiff have been carried over Global Crossing's telephone network, but Global Crossing has failed and refused to provide Plaintiff a full accounting of such calls, and has failed and refused to pay Plaintiff the full amounts of payphone compensation required to be paid under federal law, despite Plaintiff's demands. Plaintiff seeks an accounting of the amounts of payphone compensation owed by Global Crossing for all compensable calls, and judgment for such amounts, plus interest, costs, and attorneys' fees as provided by law.

II. PARTIES

3. Plaintiff Metrophones Telecommunications, Inc. ("Metrophones") is a payphone service provider with its headquarters and principal place of business located in Bellevue, Washington.

4. Plaintiff owns and operates one or more coin-operated and/or coinless payphones for use by the public. As defined by the FCC, Plaintiff is an independent PSP.

5. On information and belief, Defendant Global Crossing is a Michigan corporation with its principal place of business in New York. Unidentified Companies I through X are other subsidiaries and/or affiliates of Global Crossing. Inasmuch as the vast and complex structure of the Global Crossing family of companies makes it difficult to ascertain which particular affiliates are responsible to pay payphone compensation to Plaintiff, as alleged herein, Plaintiff reserves the right to amend its complaint to specifically name such responsible parties, upon ascertainment of the identity thereof. Upon information and belief, all Defendants have acted in concert with respect to the matters alleged herein. As used hereinafter, the term "Global Crossing" refers to the affiliate or affiliates that are responsible for the payment of

payphone compensation to Plaintiff, as alleged herein. Global Crossing regularly conducts business in the state of Washington.

6. Global Crossing is a common carrier as defined in 47 U.S.C. § 153(10). As such, Global Crossing is subject to regulation by the FCC under Title 47 of the United States Code.

7. Global Crossing provides various telecommunications services to the public through its telecommunications network that is accessible from Bellevue, Washington and elsewhere in Washington and the United States. Such services include the carriage over Global Crossing's telecommunications network of various types of calls placed from payphones, such as access code calls (calls made by first accessing Global Crossing's network through dialing a code number) and toll-free calls (calls for which the recipient has previously agreed to pay the toll charges)

III. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States. Further, 47 U.S.C. § 207 grants subject matter jurisdiction over this action to this Court.

9. Venue is proper in the United States District Court for the Western District of Washington, under 28 U.S.C. §§ 1391(b) and 1391(c), because Defendant Global Crossing is subject to personal jurisdiction in this district and hence, is deemed to reside in this district.

IV. PAYPHONE COMPENSATION UNDER FEDERAL LAW

10. As a PSP, Plaintiff makes its payphones available to the public to enable persons to make telephone calls. Plaintiff receives compensation for some types of payphone calls through direct payment by the caller (e.g. through the deposit of coins into the payphone) or through commission payments from Plaintiff's presubscribed carrier (the carrier to which operator-assisted calls are automatically routed by agreement between Plaintiff and such carrier). However, a substantial portion of calls placed from Plaintiff's payphones can be and are made without any compensation to Plaintiff from the caller or from Plaintiff's presubscribed carrier. Such calls include access code calls and toll-free calls (all of which shall be referred to hereinafter as "coinless" calls) that are initiated from Plaintiff's payphones and are routed over various carriers' telecommunications networks and facilities, including those of Global Crossing. For coinless calls, the interexchange carrier receives payment through various means, including the use of calling cards, credit cards, debit cards, prepaid cards, and calls billed to another party (e.g., collect, third-party, and toll-free calls).

11. In February, 1996, Congress enacted the Telecommunications Act of 1996 (the "Act"). In relevant part, the Act directed the FCC to prescribe regulations that "establish a per call compensation plan to ensure that all independent payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation." 47 U.S.C. § 276(b)(1)(A).

12. Pursuant to the Act, the FCC has promulgated

regulations and has issued orders that require carriers, including Global Crossing, to pay payphone compensation to PSPs, such as Plaintiff, for all completed coinless calls made from a payphone where the caller utilizes a carrier other than the payphone's presubscribed carrier. Such coinless calls include, without limitation, (1) calls that are terminated on Global Crossing's own network; (2) calls that are initially routed by the local exchange carrier to Global Crossing's network; and (3) calls from Global Crossing's network that are routed to other carriers and/or resellers for completion. In particular, the FCC has promulgated the following regulation:

> a. Except as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract.

47 CFR § 64.1300(a)

13. Pursuant to the Act, the FCC has issued orders establishing the default per call compensation rate (i.e. the rate that applies in the absence of a contract between the PSP and the carrier) at $.24 per call for all compensable calls made from and after April 21, 1999 rate aff'd sub. Nom. *American Pub. Communications Counsel v. FCC*, 215 F.3d 51 (D.C. Cir. 2000).

14. Pursuant to the Act, the FCC has promulgated regulations and has issued orders requiring each ~~carrier~~, including Global Crossing, to track or arrange for the tracking of each compensable coinless call carried over its

network including, but not limited to, coinless calls completed by Global Crossing and coinless calls routed to Global Crossing's resellers and other interexchange carriers. In particular, the FCC has promulgated the following regulation:

> (a) It is the responsibility of the first facilities-based interexchange carrier to which a compensable coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier to track, or arrange for the tracking of, each such call so that it may accurately compute the compensation required by § 64.1300(a). The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier must also send back to each payphone service provider at the time dial around compensation is due to be paid a statement in computer readable format indicating the toll-free and access code numbers that the LEC has delivered to the carrier, and the volume of calls for each toll-free and access number each carrier has received from each of that payphone service provider's payphones, unless the payphone service provider agrees to other arrangements.

47 C.F.R. § 1310(a)

15. Under FCC-approved procedures adopted by

the telecommunications industry, PSPs, such as Plaintiff, provide to carriers, such as Global Crossing, or to their designated agent(s), on a calendar quarter basis, a list of the telephone numbers of the payphones owned and operated by the PSP as of the end of the applicable calendar quarter. Each such unique telephone number is referred to as an "ANI," which is the acronym for "Automatic Number Identification." The ANI, which may also include payphone specific coding digits identifying as a payphone the telephone from which a call is made, is transmitted with each call made from a payphone, and is recorded and stored by the carrier to whose network the call is routed. The carrier can determine which calls carried over its network were made from which payphones by comparing the ANI lists submitted by a PSP to the carrier's call detail records or other records maintained by the carrier identifying the ANI for each recorded call. By such means, the carrier can also determine to whom payment of payphone compensation should be made, and the amount of such payment.

16. Plaintiff is able to determine, with a high degree of accuracy, the number of compensable coinless calls made from each of its payphones and routed to Global Crossing as the first facilities-based interexchange carrier. Such data are collected by a third party, Bulletins, to whose services Plaintiff subscribes.

17. Pursuant to FCC regulations, carriers are required to remit payment of payphone compensation to PSPs on a quarterly basis.

18. From January 29, 2002 to the date of this Complaint, many compensable coinless calls have been made from the payphones of Plaintiff, which have been routed by the applicable local exchange carrier to Global Crossing as the first facilities-based interexchange carrier.

19. Plaintiff has submitted its ANI lists to Global Crossing or its designated agent for the periods of the first quarter, 2002, to the third quarter, 2002, and will continue to submit their ANI lists to Global Crossing each calendar quarter thereafter.

20. Plaintiff has also submitted demands to Global Crossing for payment of the payphone compensation owed to it, in the form of invoices and other demands for payment.

21. Although Global Crossing has made some partial payments of payphone compensation to Plaintiff, Global Crossing has failed and refused to pay the full amount of payphone compensation owed to Plaintiff for the periods for which Plaintiff has submitted its ANI lists and invoices, in amounts to be proven at trial. Attached hereto as Exhibit A is a chart showing the amount payable by Global Crossing to Plaintiff for the period of the first quarter, 2002, through the third quarter, 2002, together with the amount paid and the balance owing, including interest.

22. Inasmuch as Global Crossing continues to accrue liability to pay payphone compensation to Plaintiff, Plaintiff reserves the right to amend its complaint prior to and/or after trial to allege the amounts owing as of the date of trial.

23. Despite sufficient demand from Plaintiff, Global Crossing's willful refusal to pay the full amount of payphone compensation to Plaintiff or to provide a proper accounting to Plaintiff has continued over many months and years. In the meantime, Global Crossing has reaped substantial profits from the calls placed from Plaintiff's payphones. Furthermore, Global Crossing has collected

millions of dollars in payphone surcharges from its customers, which were imposed for the specific purpose of providing funds from which Global Crossing could make payment to the PSP of the payphone compensation Global Crossing owes to the PSP, including Plaintiff, yet Global Crossing has failed and refused to pay over to Plaintiff the surcharges so collected.

FIRST CAUSE OF ACTION
VIOLATION OF TITLE 47, UNITED STATES CODE, AND REGULATIONS AND ORDERS OF THE FCC

24. Plaintiff realleges ¶¶ 1 through 23.

25. Global Crossing's failure and refusal to pay the full amount of payphone compensation owed to Plaintiff violates Section 276 of the Act and the regulations and/or orders issued by the FCC pursuant thereto.

26. Global Crossing's violations of Section 276 of the Act and the FCC regulations and orders requiring payment to Plaintiff of payphone compensation have caused substantial monetary damage to Plaintiff, in the amounts set forth on Exhibit A attached hereto and incorporated herein, such amounts to be proven at trial, together with such additional amounts as may accrue to the date of trial.

27. Under 47 U.S.C. § 206, Global Crossing is liable to Plaintiff for the full amount of damages sustained by Plaintiff in consequence of Global Crossing's violations of Section 276 of the Act and the FCC regulations and/or orders issued pursuant thereto.

28. The FCC has required that a carrier that fails to pay the full amount of payphone compensation by the required due date must pay interest on the unpaid balance at

the rate of 11.25% per annum. Accordingly, Global Crossing owes Plaintiff pre-judgment interest on the unpaid payphone compensation at the rate of 11.25%, beginning as of the first day of the quarter following the submission by Plaintiff to Global Crossing of an ANI list. Alternatively, Global Crossing owes Plaintiff pre-judgment interest at the maximum rate permitted under applicable state law.

29. Global Crossing is liable for Plaintiff's reasonable attorneys' fees pursuant to 47 U.S.C. § 206

SECOND CAUSE OF ACTION
QUANTUM MERUIT

30. Plaintiff realleges ¶¶ 1 through 29.

31. Plaintiff has rendered valuable business services to Global Crossing's benefit.

32. The value of Plaintiff's services rendered to Global Crossing has been set at .24 cents per call originated through Plaintiff's payphones via the "Dial Around" services described above. Accordingly, as of the filing of this Complaint, Plaintiff is entitled to the amounts outlined on Exhibit A attached hereto.

33. Because Global Crossing has not compensated Plaintiff .24 cents per call for all calls routed over its network from plaintiff's payphones, Global Crossing has not only been unjustly enriched in the amounts outlined on Exhibit A, but should be required to pay interest at 11.25% per annum for late payment, pursuant to orders/regulations of the FCC.

34. Global Crossing is liable for Plaintiff's reasonable attorneys' fees pursuant to 47 U.S.C. § 206.

WHEREFORE, Plaintiff prays for judgment against Global Crossing as follows:

1. On the First Cause of Action, for all payphone compensation owed by Global Crossing to Plaintiff under regulations and orders of the FCC, in the amounts set forth on Exhibit A attached hereto, together with such additional amounts as may accrue to the date of the trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

2. On the Second Cause of Action, for the amounts set forth on Exhibit A attached hereto, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

V. DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issues that may be tried to a jury.

DATED: March 19, 2003.

KELLER ROHRBACK L.L.P.

/s/
David J. Russell, WSBA #17289
Attorneys for Plaintiff
Metrophones Telecommunications, Inc.

EXHIBIT A

METROPHONES TELECOMMUNICATIONS, INC.
2020 124th Avenue NE, Suite C-103
Bellevue, WA 98005
(425) 869-7551

STATEMENT OF ACCOUNT

As Of 3-31-03

DESCRIPTION (PREVIOUSLY BILLED AND UNPAID DIAL AROUND) BY BULLETINS

Global Crossing Telecommunications, Inc.
180 S. Clinton Avenue
Rochester, NY 14646
(716) 777-8456

Period	Call Count	Rate	Due	Payments
1Q2002 (Jan. 28-Mar 31)	35684	$0.24	$ 8,564.16	$4,455.48
2Q2002	56894	$0.24	$13,654.56	$7,240.44
3Q2002	127664	$0.24	$30,639.36	$6,957.48

Period	Percent	Disputed	Interest	Owed
1Q2002 (Jan. 28-Mar 31)	52.02%	$1,026.48	$260.06	$ 3,342.26
2Q2002	53.03%	$1,596.00	$271.02	$ 5,089.14
3Q2002	22.71%	$1,409.28	$626.42	$22,899.02
			Total Due	**$31,330.42**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., et al., Defendant(s).	)	No. C03-0694P ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFF'S MOTIONS TO AMEND
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. SOUTHWESTERN BELL COMMUNICATION SERVICES, INC., and WILTEL COMMUNICATIONS, INC., Defendant(s).	)	No. C03-0809P
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. VARTEC TELECOM, INC., Defendant(s).	)	No. C03-0811P

This matter comes before the Court on several nearly identical motions in three related cases. Plaintiff Metrophones Telecommunications Services, Inc. ("Metrophones"), a "payphone service provider," has

brought three lawsuits against four long distance phone service carriers, Global Crossing Telecommunications, Inc., Southwestern Bell Communication Services, Inc., Wiltel Communications, Inc., and Vartec Telecom, Inc. The cases were originally assigned to three different district judges, but the later two were reassigned to Judge Marsha Pechman on the Court's own motion as related to C03-0694P, as all three cases present substantially similar legal issues. In each of the cases, Metrophones originally asserted a private right of action under Section 276 of the Telecommunications Act of 1996 and the common law cause of action of quantum meruit. The Ninth Circuit then declared that no such private right of action exists, and each of the defendants in these cases moved to dismiss the § 276 claims on this ground, and to dismiss the quantum meruit cause of action as preempted. *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). Also in each case, plaintiff Metrophones has moved to amend the complaints to include federal causes of action under three other sections of the Telecommunications Act, as well as two other common law causes of action. Defendants oppose the amendments, contending that such amendment would be futile. Having reviewed the papers and pleadings submitted by the parties, the Court hereby GRANTS the defendants' motions to dismiss as to the § 276 claims, but denies those motions as to quantum meruit, as the Court does not view those claims as preempted. In addition, the Court GRANTS the motions to amend, as a private right of action will be allowed under two of the three sections of the Act, and the common law causes of action are not preempted. As these cases involve two controlling questions of law that present novel issues in the Ninth Circuit, the

Court will entertain a proper motion for certification of interlocutory appeal under 28 U.S.C. § 1292(b).

BACKGROUND

Plaintiff Metrophones is a "payphone service provider" that owns and operates public payphones. Metrophones brings these lawsuits against Global Crossing Telecommunications, Inc. ("Global Crossing"), Southwestern Bell Communication Services, Inc. ("Southwestern Bell"), Wiltel Communications, Inc. ("Wiltel"), and Vartec Telecom, Inc. ("Vartec"), which are interexchange (long distance) carriers, for an alleged failure to pay compensation for coinless payphone calls made using Metrophones' payphones.

Payphone service providers ("PSPs") such as plaintiff are compensated for the use of their payphones in two primary ways, either through direct payment by the caller by insertion of coins into the payphone, or "commission payments" from the PSP's "presubscribed carrier," the carrier to which operated-assisted calls are automatically routed. Compl. at 3. Yet calls are also made without utilizing either of these compensation methods, namely credit card (access code) calls and toll-free calls (collectively "coinless" calls). *Id.* For these calls, the caller pays the interexchange (long distance) carrier, but there is no direct means by which the PSP is compensated. *Id.*

In enacting the Telecommunications Act of 1996, Congress restructured and deregulated much of the local telephone industry. Relevant to the present lawsuit, Section 276 of the Act was aimed at promoting competition in the

payphone service industry.[1] That section prohibits "any Bell operating company that provides payphone service" from discriminating in favor of its own payphone service. 47 U.S.C. § 276(a). It also directs the Federal Communications Commission to promulgate regulations that:

> (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.

Id. at § 276(b)(I)(A).

To that end, the FCC has promulgated regulations and has issued orders requiring long distance carriers and local carriers to compensate PSPs on a per call basis for calls made using their payphones. 47 C.F.R. § 64.1300 (2003).[2]

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[1] An in depth background of the Act and its history is set forth in *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

[2] The regulations were substantially revised by the Commission's order of October 3, 2003, which switches the obligation to pay from the "first interexchange carrier" to the "completing carrier," and included local exchange carriers in the definition. *In the Matter of The Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996*, Dkt. No. 96-128, 2003 WL 22283556, 30 Communications Reg. (P&F) 609, F.C.C. (Oct. 3, 2003).

Specifically, the FCC now requires that the "completing carrier" (the interexchange or local carrier that completes a coinless call) must compensate the PSP at a rate agreed upon by the parties. *Id.* at § 64.1300(b). In the absence of such an agreement, the rate is twenty-four cents per call. *Id.* at § 64.1300(d). Further, it is the duty of the completing carrier to track the calls in order to ensure adequate compensation. *Id.* at § 64.1310(a).

After implementation of these regulations, several PSPs (including plaintiff Metrophones) brought an action against Sprint Communications Company for alleged underpayment of per call compensation owed under the regulations. Prior to the defendant even being served, the district court sua sponte dismissed the action on the ground that while § 276 authorized the FCC to promulgate regulations, it did not create an express or implied private right of action based on those regulations. The Ninth Circuit affirmed that decision in the absence of a defendant, holding that § 276 directs the FCC to establish a plan for compensation, but does not create a right to compensation. *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). Although §§ 206 and 207 of the Act create liability for "violations" of the "provisions of this chapter" and a right to sue by persons damaged by such violations, the court reasoned that § 267 did not itself create a duty that one could "violate." *Id.* The court concluded that, unlike some other sections of the Act (i.e. 227(b)(3)(A)), § 267 did not establish a right to sue for violations of its corresponding regulations. *Id.* It appears that plaintiffs in that case did allege a common law quantum meruit cause of action as well, but this was not addressed by the court, and easily

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The Court does not perceive the changes in the regulations to affect the resolution of the issues presented in the motions before it.

could have been dismissed on the basis of lack of subject matter jurisdiction.

Defendants now bring motions to dismiss,[3] arguing that plaintiff's § 267 cause of action has been rendered moot by the *Greene* decision, and that plaintiff's claim for quantum meruit is preempted by the Telecommunications Act, § 276(c). Plaintiff responds by arguing that the Court should hold in abeyance the motions to dismiss as they relate to the § 276 private right of action in order to allow the plaintiffs in *Greene* to file for a writ of certiorari. Plaintiff further argues that the quantum meruit claim is not preempted. Finally, plaintiff moves to amend the complaints to include both new theories of private right of action under the Act, and two other state common law causes of action. Defendants oppose the motions to amend on futility grounds, saying that an end run around *Greene* should not be allowed, and that each of the other state law claims is likewise preempted.

ANALYSIS

A. Private Right of Action Under & 276

Plaintiff argues that despite the clear mandate from the Ninth Circuit that there is no private right of action under § 276 or its regulations, this Court could refuse to "immediately implement the narrow holding of the three-judge panel in *Greene*," and hold the matter in abeyance until after it is determined whether the Supreme Court will

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[3] Defendant Global Crossing has styled its motion as a motion for judgment on the pleadings, but its arguments are identical to those presented in the other two cases.

grant a writ of certiorari on the issue, which plaintiff's counsel in the *Greene* case plans to file soon.

The parties agree that *Greene* is the governing law in the present case, and also recognize that the filing of a petition for certiorari does not change the binding effect of the Ninth Circuit's decision on this Court. While plaintiff argues that the Ninth Circuit made the wrong decision in *Greene*, there is no authority for this Court to simply ignore it. *See Yong v. INS*, 208 F.3d 1116, 1119 n. 2 (9th 18 Cir. 2000); *Wedbush, Noble. Cooke. Inc. v. SEC*, 714 F.2d, 923, 924 (9th Cir. 1983). Yet plaintiff asks the Court to do just that, based on its assertion that "the law in this area is not settled and because the *Greene* decision is still being appealed." Yet the Ninth Circuit has already denied a petition for rehearing en banc. Further, this Court does not presume to know, nor will it hazard a guess, as to what the U.S. Supreme Court will or will not do if presented with a petition for certiorari. What is certain, is that *Greene* is the current controlling law of the Ninth Circuit, and that is the law this Court must follow. The Ninth Circuit has definitively decided the issue, the motion is ripe for decision, and plaintiff's claim for a private right of action under § 276 is dismissed.

B. Preemption of State Law Claims Under § 276(c)

Federal preemption of state law originates from the Supremacy Clause of the Constitution, which invalidates laws that "interfere with or are contrary to federal law." *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298,302 (9th Cir. 1995) (internal quotations omitted). The rule regarding preemption is easy to state, yet tricky to apply – "'[t]he purpose of Congress is the ultimate touchstone' of the

preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504,516 (1992), *quoting Malone v. White Motor Com.*, 435 U.S. 497, 504 (1978). There are three basic situations in which preemption of state law occurs: (1) express preemption, where a federal statute specifically defines its preemptive force; (2) implied, or "field" preemption, where federal regulation of an area of the law is so complete that there is no room for state regulation to occur; and (3) conflict preemption, where compliance with both federal and state requirements would be impossible. *See Hillsborough County, Fla. v. Automated Medical Labs.*, 471 U.S. 707, 712-13 (1985). In addition, a cause of action may be said to "arise under" federal law "if the right to relief under" state law "requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Board of State of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 13 (1983).

The present cases involve a question of express preemption. In such a case, "the task of statutory construction [of an express preemption clause] must in the first instance focus on the plain wording of the clause, which necessarily entails the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) *quoting CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658,664 (1993). Section 276(c) of the Telecommunications Act of 1996, 47 U.S.C. § 276(c) provides:

> (c) State Preemption
>
> To the extent that any State requirements are inconsistent with the Commission's regulations, the

> Commission's regulations on such matter shall preempt such State requirements.

The preemptive scope of this provision is relatively narrow. Compare *Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992) (recognizing broad preemptive effect of Airline Deregulation Act that preempts state laws "relating to" air carrier rates, etc.) with *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (preemptive force of federal regulations "covering the same subject matter" viewed as narrow). When Congress intends broad preemptive force, it certainly knows how to provide for it.

While the express preemption clause of § 276 has yet to be interpreted by the Ninth Circuit, it is very similar in scope to the one interpreted in *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995). There, the court was interpreting federal statutes regulating cable television, which included a provision stating that "no . . . state may regulate the rates for the provision of cable services except to the extent provided under this section and section 532 of this title." *Id.* at 301 and n. 4. The defendant argued that plaintiff's causes of action brought under the state's general unfair business practices act were preempted by the federal cable acts. The Ninth Circuit disagreed, finding that there was nothing inconsistent between the cable acts and the general state statute. *Id.* at 302. The court held that by using the language "regulate the rates," Congress had signaled its intent to limit preemption under the Cable Acts. *Id.*

The language at issue in § 276 is even narrower. In passing the Telecommunications Act of 1996, and in

particular in enacting § 276, Congress provided a very narrow preemptive scope – one that is only invoked when "state requirements are inconsistent with the Commission's regulations." There is nothing inconsistent between the regulations promulgated pursuant to § 276 and the common law doctrine of quantum meruit. In fact, the purpose of each are entirely consistent. The regulations were promulgated in order to "promote competition among payphone service providers and [to] promote the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1). The doctrine of quantum meruit is an equitable one, serving to prevent the unjust enrichment of the defendant in the absence of an enforceable contract by forcing compensation to the plaintiff in an amount equal to the value of the benefit conferred on the defendant. *Eaton v. Engelcke Mfg. Inc.*, 25 37 Wn. App. 677, 680, 681 P.2d 1312 (1984). Competition is fostered by a level playing field, one on which there is equity. The purposes of the regulations and the doctrine of quantum meruit are aligned.

This result is also consistent with the statute's "savings clause," which states generally that "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. Though it is true that clauses such as these are ineffective if a state law is nevertheless in conflict with a federal statute or regulation, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (doctrine of conflict preemption applies even in face of savings clause), such is not the case here. Nothing in § 276 indicates that Congress intended the regulations to provide the sole remedy regarding collection of monies owed to payphone service

providers. Congress only intended to eliminate inconsistent state requirements.

Finally, plaintiff's quantum meruit cause of action should not be considered to "arise under" federal law as involving a "substantial question of federal law." "The fact that a case may turn in part upon the resolution of some issue of federal law or that federal law constitutes an ingredient of the state law claim for relief does not automatically convert a state claim" into a federal one. *Precision Pay Phones v. Qwest Communications Corp.*, 210 F. Supp. 2d 1106, 1117 (N.D. Cal. 2002). In the present case, resolution of the state law cause of action for quantum meruit will not involve a substantial federal question. The FCC regulations in this case establish an obligation to pay on a per call basis and define a rate in the absence of a contract between the parties. Quantum meruit, under Washington law, is a remedy to compensate a plaintiff for the reasonable value of services rendered where retention of that value would be unjust. *Douglas Northwest. Inc. v. Bill O'Brien & Sons 22 Constr. Inc.*, 64 Wn. App. 664, 683, 828 P.2d 565 (1992). Thus the only point at which the state law claim and the federal regulations connect is in establishing the reasonable value of the payphone services provided to the carriers. This does not involve resolution of a substantial federal question.

For each of the above reasons, the Court holds that the plaintiff's state law cause of action for quantum meruit is not preempted.

C. Motion to Amend Complaint

Plaintiff also moves to amend the complaints to include additional federal causes of action under three other

provisions of the FTA and state law causes of action for implied contract and negligence.

Leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Motions to amend are typically granted provided that the amendment will not unduly prejudice the opposing party, is not sought in bad faith, will not cause undue delay, and does not constitute an exercise in futility. *DCD Programs. Ltd.v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Defendants oppose amendment of the complaints in these cases on the ground that the new alleged causes of action would not survive a motion to dismiss under Rule 12(b)(6) and would therefore be futile.

Plaintiff's amended complaints state three new theories of liability and private right of action. Specifically, plaintiff would like to amend in order to state a cause of action under § 201(b) of the Act, which ostensibly requires that all charges, practices, classifications, and regulations be "just and reasonable." Next, plaintiff argues that the regulations and "orders" issued pursuant to the FCC's rulemaking authority should be considered "orders for payment of money" as the term is used in § 407, which allows private parties who were the intended beneficiaries of the order to file suit against a party that has failed to comply with that order. Plaintiff also argues that § 416(c) establishes a duty to comply generally with orders of the Commission. None of these statutory provisions were at issue or addressed by the Ninth Circuit in *Greene*. Finally, plaintiff asks for leave to amend to include two more state common law causes of action for implied contract and negligence.

1. Section 201 (b)

Section 201(b) of the Act provides that

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is *declared to be unlawful.*

47 US.C. § 201(b)(emphasis added). Meanwhile, § 206 states that:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or *declared to be unlawful*, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby. . .

47 U.S.C. § 206 (emphasis added). Finally, § 207 establishes the private right of action:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as

> hereinafter provided for, or may bring suit for the recover of the damages for which such common carrier may be liable *under the provisions of this chapter*, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 US.C. § 207 (emphasis added).

In interpreting the above statutory provisions, the D.C. Circuit has held that a common Carrier's failure to comply with a Commission "rate of return prescription" constituted a "per se violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates" under § 201. *MCI Telecommunications Co. v. F.C.C.*, 59 F.3d 1407, 1413-14 (D.C. Cir. 1995). This rationale was used to allow a § 201(b) cause of action for violations of the regulations promulgated under § 276 in *APCC Services. Inc. v. Cable & Wireless. Inc.*, 281 F.Supp.16 2d 52, 58 (D.D.C. 2003).

The Court finds this authority persuasive. Although § 276 may not in and of itself provide for a private right of action, § 201 declares unreasonable practices to be unlawful. The Court finds that failure to comply with Commission regulations would per se be an unreasonable practice, and therefore violative of § 201. Since § § 206 and 207 allow a private right of action for acts declared unlawful under the provisions of this chapter, plaintiff may state a cause of action for unreasonable practices under § 201.

The Court is further persuaded by the FCC's recent determination that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201 (b) of the Act." *In the Matter of The Pay Telephone 2 Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Dkt. No. 96-128, 2003 WL 22283556, 30 Communications Reg. (P&F) 609, F.C.C. (Oct 03, 2003). This agency interpretation of the statute is entitled to substantial deference, as the precise issue of whether a violation of the Commission's regulations on PSP compensation would be a violation of § 201 is not specifically addressed by the language of the statute. *Chevron U.S.A.. Inc. v. Natural Resources Defense Council. Inc.*, 467 U.S. 837 (1984). Accordingly, this Court will allow amendment of the 8 complaints to include a cause of action under § 201(b).

2. Section 407

Section 407 of the Telecommunications Act provides that:

> If a carrier does not comply with an *order for the payment of money* within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . a petition setting forth briefly the causes for which he claims damages, and the

> order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the *findings and order of the Commission shall be prima facie evidence of the facts therein stated*, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.

47 U.S.C. § 407 (emphasis added). This provision, of course, must be read in the context of the entire statute. As explained above, § 207 allows a person to attempt to recover damages by either filing a complaint with the Commission or filing a suit for damages in district court. The sections that follow establish various procedures, including procedures for filing a complaint before the Commission (Section 208) and for issuance of "orders for payment of money" (Section 209). Section 407 then gives a person the right to bring an action in district court where a carrier does not comply with an "order for the payment of money."

The Court reads the term "order for the payment of money" as a term of art. Section 407 gives an means of enforcement against carriers who do not abide by the Commission's orders for the payment of money. It is clear from §§ 208 and 209 that such orders are made after a petition is filed by a complainant and an investigation is

carried out. The order then directs a specific carrier to pay money "*to the complainant*" (emphasis added) and must give a time period for compliance. Whether or not this is an "order" in the sense of an "adjudication" under the Administrative Procedures Act is unclear. But what is clear is that the Telecommunications Act itself provides a distinct procedure for the issuance of an "order for the payment of money" and its enforcement.

In the present case, plaintiff is not asking this Court to enforce an "order for the payment of money" that was issued by the Commission. Instead, it is asking for a remedy pursuant to rulemaking orders. Those rulemaking orders may address issues of compensation, but they are not "orders for the payment of money" as is contemplated under §§ 209 and 407. Plaintiff's motions to amend are therefore DENIED with regard to the cause of action under § 407.

3. Section 416(c)

Section 416 is entitled "Orders of Commission." Relevant to the present case is § 416(c), which decrees that "[i]t shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with *such orders* so long as the same shall remain in effect."

Unlike the "orders for payment of money" described in the above section, this section refers generally to "orders." There is no indication that this term is to be construed as "adjudications" as set forth in the Administrative Procedures Act. In fact, it appears that where Congress wanted to adopt the APA definition of "orders," it specifically did so. *See* 47 U.S.C. § 409. The Ninth Circuit has expressly held that the APA definition should not be imported into the statute unless

specifically stated. *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1271 (9th Cir. 1987) (interpreting Section 401 of the Telecommunications Act). Neither does the statute itself provide any guidance as to what an "order" would entail. The Court does not, therefore, read the term to be so narrow. *APCC Services. Inc. v. Cable & Wireless. Inc.*, 281 F.Supp. 2d 52, 58 (D.D.C. 2003). Amendment of the complaints is therefore granted with regard to plaintiffs proposed § 416(c) cause of action.

4. Proposed State Law Claims

Plaintiff also moves to amend the complaints to include other state common law causes of action. For all of the same reasons stated above, the Court finds that plaintiff's state law claims of implied contract and negligence are not preempted by § 276(c) and the Commission's regulations. The amendment as to these claims will be allowed.

D. Interlocutory Appeal

Title 28, Section 1292(b) allows for interlocutory appeals as an exception to the general rule that only "final" orders are appealable. That provision provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a *controlling question of law* as to which there is *substantial ground for difference opinion* and that an immediate appeal from the order may

> *materially advance the ultimate termination of the litigation*, [she] shall so state in writing in such order.

28 U.S.C. § 1292(b) (emphasis added). Either the district court or the court of appeals may stay the case pending resolution of the appeal.

It appears that the present cases involve two issues of novel and controlling law as to which there is a substantial ground for difference of opinion, the first regarding alternative private rights of action under the Telecommunications Act for violations of regulations promulgated under § 276, the other regarding the preemptive scope of § 276(c). Thus, the Court will entertain a properly brought motion pursuant to 28 U.S.C. § 1292(b).

CONCLUSION

The Court holds that plaintiff's claims brought under § 276 of the Telecommunications Act against the various defendants in these cases must be dismissed under the Ninth Circuit's decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). However, plaintiff's claims for quantum meruit shall stand, as those claims are not preempted by the relatively narrow express preemption provision set forth in § 276(c) of the Act. Next, the Court finds that amendments to the complaints in these cases that assert causes of action under §§ 201(b) and 416(c) shall be allowed, as such amendments would not be futile. A cause of action under § 407, however, shall not be allowed. Finally, plaintiff's supplemental claims for two additional common law causes of action shall be allowed as well as they are not preempted by § 276(c).

The Clerk is directed to send copies of this order to all counsel of record. Dated: December 16, 2003.

/s/
Marsha J. Pechman
United States District Judge

JAN 11 2006
OFFICE OF THE CLERK

No. 05-705

IN THE
Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITONER

Respondent has not provided any convincing reason to deny review of the questions this case presents. Respondent tries to downplay the circuit split over whether payphone owners may sue in federal court to recover extra compensation for coinless calls, but the conflict is undeniably square and consequential. Respondent also suggests that the Ninth Circuit's decision is correct, but it does not even attempt to refute Petitioner's central explanations as to why the Ninth Circuit's dual holdings are wrong. Finally, Respondent suggests that this particular case is not important enough to warrant this Court's attention, but it ignores that this case is one of many, and that – as the FCC itself has stated – its legal issues are critical to the Nation's interest uniform and effective telecommunications law.

In all events, this Court should act without delay to resolve whether lawsuits like this one may be brought in federal court.

I. This Court Should Resolve The Circuit Split Over Whether Section 201(b) Creates A Private Cause Of Action To Recover For Alleged Violations Of The FCC's Payphone Compensation Regulations.

A. The Conflict Is Genuine And Meaningful.

Respondent contends that this case does not present a serious conflict because (1) the only disagreement between the Ninth and D.C. Circuits is "over the deference required by *Chevron*" and (2) that disagreement turns on this Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005), which is not discussed in the D.C. Circuit's opinion. BIO at 4-7. Neither component of this argument withstands scrutiny.

1. The Ninth and D.C. Circuits are not divided merely over some abstract *Chevron* issue; they are squarely divided over whether § 201(b) of the Communications Act creates a private cause of action to recover for alleged violations of the FCC's payphone compensation regulations. *See* Pet. App. 13a n.5 (acknowledging this conflict). Such lawsuits are permissible in the Ninth Circuit but are prohibited in the D.C. Circuit. For purposes of this Court's *certiorari* considerations, it does not matter whether this conflict is traceable to a disagreement over an application of *Chevron* principles or over other statutory-construction considerations. (It is traceable to both.) The bottom line is that two federal circuits – as well as district courts – expressly disagree over whether a private cause of action exists to enforce a federal law. *Id.*; *see also Flying J Inc. v. Sprint Communications Co.*, ___ F. Supp. 2d ___, 2006 WL 18603, at *4-5 (D. Utah Jan. 4, 2006) (siding with Ninth Circuit); *Smartstop, Inc. v. AT&T Corp.*, 374 F. Supp. 2d 930 (D. Colo. 2005) (siding with D.C. Circuit). This kind of conflict is a classic reason for granting *certiorari*. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (addressing whether a private cause of action exists to enforce a federal statute create); *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (same); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (addressing issue whether a private cause of action exists to enforce a federal regulation).

2. The D.C. Circuit's failure to discuss *Brand X* in its opinion does not provide any valid reason for delaying review of this issue. The portion of *Brand X* that Respondent contends is relevant here (BIO at 8) is nothing more than a straightforward rendition of the familiar *Chevron* two-step process for assessing the pertinence of administrative regulations. Suffice it to say, the D.C. Circuit is perfectly aware of how *Chevron* works. It simply held in its opinion resolving this issue that the FCC had not issued any order that is "entitled to *Chevron* deference." *APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1247 (D.C. Cir.

2005); *see also id.* at 1254 (Ginsburg, J., dissenting) (arguing, to no avail, that *2003 Payphone Order* is entitled to deference).

Furthermore, even if *Brand X* were somehow relevant to the circuit split here, Respondent itself acknowledges that the D.C. Circuit had ample opportunity in the petition for rehearing or rehearing en banc to consider whether *Brand X* made any difference to its holding. BIO at 7 n.4. The D.C. Circuit declined to grant rehearing, indicating (quite rightly) that it does not.

B. The Ninth Circuit's Decision Contravenes This Court's Precedent.

Respondent argues that a private cause of action must exist to enforce the FCC's payphone compensation regulations because Petitioner acknowledges that payphone owners may bring such claims administratively in the FCC. BIO at 11-13. Sections 206 and 207 of the Act give plaintiffs the right to seek redress for certain injuries either in the FCC *or* in federal court. Thus, in Respondent's view, once it is clear it may seek to enforce the FCC's regulations in the FCC, it must also be able to do so in federal court. BIO at 7-9.

Respondent, however, overlooks the fact that payphone service providers' right to bring claims to the FCC seeking to enforce FCC regulations derives from the FCC's general powers described in 47 U.S.C. § 154(i), not from section 206 or 207. *See* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); Pet. at 11-12. Sections 206 and 207 are triggered only when something "in this chapter"– that is, the Act itself – has been violated. And, as Petitioner explained extensively in its Petition for Certiorari (Pet. 13-15), failing to pay

compensation for coinless payphone calls does not violate any provision *of the Act*. Respondent does not even contend otherwise. Accordingly, this Court's decision in *Sandoval* forecloses a federal court from creating a private remedy where Congress did not. *See* Pet. 13-15.

II. This Court Should Resolve Whether Section 276 Preempts Similar State Law Claims For *Quantum Meruit* And Breach Of Implied Contract.

Respondent asserts that *certiorari* is inappropriate with respect to its state-law claims because there is no express circuit conflict on the issue – that is, because the D.C. Circuit's *APCC* decision does not expressly foreclose such claims. BIO at 9-10. But Respondent never answers Petitioner's argument that state-law claims are permissible only if a private federal cause of action exists to enforce violations of the FCC's payphone compensation regulations. *See* Pet. 16-17. Thus, the Ninth Circuit's decision to allow such claims is at odds with prevailing law in the D.C. Circuit.

In any event, whatever the extent of the circuits' disagreement over the permissibility of bringing state-law claims to obtain compensation for coinless payphone calls, the issue warrants *certiorari* in its own right. For reasons Petitioner has explained – and that Respondent does not even try to refute – the Ninth Circuit's ruling creates serious logistical problems for long distance carriers and rests on a careless reading of the FCC's regulations. Pet. App. 11-12, 17-18.

III. The Issues This Case Presents Are Very Important.

Respondent's final argument for denying review is that *this particular case* is not important enough to justify review

because it involves only about $30,000. BIO at 10.[1] But Respondent does not dispute that *the questions presented* are sufficiently weighty to warrant expending this Court's resources. Indeed, several payphone service providers seeking *certiorari* in the D.C. Circuit case expressly have acknowledged that the Petition for Certiorari here "correctly identifies business and litigation uncertainty that arises from conflicting lower court decisions" in this area. Petition for Certiorari at 30, *APCC Servs., Inc. v. Sprint Communications Co.* (No. 05-766) ("*APCC* Pet. for Cert.").[2] That is because, in the aggregate, millions of dollars are at stake in the several cases like this one that are pending or waiting in the wings across the country. *See* Pet. 10-13; *see also Flying J Inc.*, ___ F. Supp. 2d at ___, 2006 WL 18603, at *4-6 (adopting Ninth Circuit's view of circuit conflict and allowing claims under § 201(b) and state-law contract-related theories to go forward). Indeed, Respondent's counsel himself recently filed another such case in California, seeking over $600,000

---

[1] Respondent filed an initial complaint in late 2001. After Global Crossing declared bankruptcy, Respondent filed a new complaint in March of 2003, seeking only about $30,000. In early 2003, the district court entered an order staying the litigation in the original case, but noting that the case remained pending and that the stay "shall not prejudice the rights of any party." Order Removing Case from Active List at 1, *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.* (No. C01-1852). Respondent's description in its brief in opposition of its "complaint" refers only to its new complaint. *See* BIO at 2 n.1. In any event, as Respondent implicitly recognizes, both of its complaints seek the same kind of relief and raise both questions presented here.

[2] This case is plainly the superior vehicle for resolving the confusion in this area of telecommunication law. There is serious doubt in *APCC* whether the plaintiffs/petitioners have standing; the D.C. Circuit panel divided on the issue. *Compare APCC Servs.*, 418 F.3d at 1242-45 (majority opinion) *with id.* at 1250-53 (Sentelle, J., dissenting). Furthermore, this case, unlike *APCC*, raises the significant question whether payphone service providers may advance state-law claims to recover compensation for coinless phone calls.

in payphone compensation. *See* Complaint at 7 ¶ 26 & Exhibits A-C, *Wolfe v. Global Rock Networks, Inc.*, No. 05-8328 AHM (C.D. Cal.) (filed Nov. 23, 2005). And uniformity is vitally important in this area of telecommunications law. *See* Pet. 11-12; *APCC* Pet. for Cert. at 29-30.

Lest there be any doubt on this score, the FCC itself participated as *amicus curiae* in both the Ninth Circuit and D.C. Circuit cases, stating that the cases "raise[] important issues regarding enforcement of the Communications Act, in general, and the Act's payphone compensation regulations, in particular." Brief for FCC as Amicus Curiae in Support of Appellee at 1, *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Ins,* 423 F.3d 1056 (9th Cir. 2005) (No. 04-35287). The FCC is correct, and this Court should bring clarity and order to these matters.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,

Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Pursuant to Rule 26.1, the following relevant materials are omitted from the Joint Appendix. They were included in the appendix to the petition for a writ of certiorari and can be found therein at the page numbers below.

District Court's Order on Defendants' Motions to Dismiss and Plaintiff's Motions to Amend ... Pet. App. 40a-58a

Ninth Circuit's Opinion..... Pet. App. 1a-39a

RELEVANT DOCKET ENTRIES

U.S. District Court
WESTERN DISTRICT OF WASHINGTON (Seattle)
CIVIL DOCKET FOR CASE #: 2:03-cv-00694-RSM

Date Filed	#	Docket Text
03/19/2003	1	COMPLAINT and JURY DEMAND (Summons(es) issued) Receipt # 850415 (PM) (Entered: 03/24/2003)

* * *

10/20/2003	11	RESPONSE to 9 Dft's MOTION for Judgment on the Pleadings, and MOTION for Leave to Amend 1 Complaint by Plaintiff Metrophones Telecommunications Inc. Noting Date 10/29/2003. (Attachments: # 1 Exhibit A-C# 2 Text of Proposed Order) (AF,) (Entered: 10/24/2003)

* * *

12/16/2003	20	ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFF'S MOTIONS TO AMEND; re: 9 MOTION for Judgment on the Pleadings, and 11 MOTION to Amend; by Judge Marsha J. Pechman. (AF,) (Entered: 12/16/2003)

* * *

01/12/2004	29	ORDER granting 22 Motion for Interlocutory Appeal/Certificate of Appealability, by Judge Marsha J. Pechman. (AF,) (Entered: 01/12/2004)

03/26/2004	30	ORDER of USCA (04-80015) as to 22 MOTION for Certificate of Appealability filed by Global Crossing Telecommunications Inc. The petition for permission to appeal is GRANTED. Within 10 days of this order, petitioner shall perfect the appeal. (SA) Modified on 4/1/2004 (SA). (Entered: 04/01/2004)

* * *

US Court of Appeals for the Ninth Circuit

1/12/05	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Alfred T. GOODWIN, Susan P. GRABER [04-35287] (kym) [04-35287]
	* * *
6/30/05	Filed order (Mary M. SCHROEDER, Alfred T. GOODWIN, Susan P. GRABER,): The parties, including amicus, are to file supply briefs addressing the following question: How does National Cable & Telecommunications Ass'n v. Brand X Internet Servs. No. 04-277, 2005 WL (U.S. 6/27/05) affect the analysis of the issues before the court in the present case? The briefs are not to exceed 20 pages and are to be filed simultaneously within 21 days of the filed date of this order. [04-35287] (kkw) [04-35287]
	* * *
9/8/05	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party shall bear its own costs on appeal. Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Mary M. SCHROEDER; Alfred T. GOODWIN; Susan P. GRABER, author.) FILED AND ENTERED JUDGMENT. [04-35287] (kkw) [04-35287]
	* * *

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

METROPHONES TELECOMMUNICATIONS, INC., a Washington corporation, Plaintiff, v GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation and UNIDENTIFIED COMPANIES I THROUGH X, Defendants.	No. C03-0694P COMPLAINT JURY TRIAL DEMANDED (Filed Mar. 19, 2003)

The Plaintiff above named complains of Defendants as follows:

I. INTRODUCTION AND SUMMARY OF COMPLAINT

1. Under 47 U.S.C. § 276(b)(1)(A), 47 C.F.R. §§ 64 1300 et seq., and various orders of the Federal Communications Commission ("FCC") in Common Carrier Docket No. 96-128, Defendant Global Crossing Telecommunications, Inc. ("Global Crossing"), as an interexchange carrier of various types of long distance communications, is required to compensate Plaintiff, as a payphone service provider ("PSP"), at the rate prescribed by the FCC, for each and every compensable call including, but not limited to, completed access code calls and toll free calls, that has been made at any time since January 29, 2002 from a payphone owned by Plaintiff and carried over Global Crossing's telephone network facilities. Such compensation is referred to herein as "payphone compensation."

2. Many compensable calls placed from payphones owned by Plaintiff have been carried over Global Crossing's telephone network, but Global Crossing has failed and refused to provide Plaintiff a full accounting of such calls, and has failed and refused to pay Plaintiff the full amounts of payphone compensation required to be paid under federal law, despite Plaintiff's demands. Plaintiff seeks an accounting of the amounts of payphone compensation owed by Global Crossing for all compensable calls, and judgment for such amounts, plus interest, costs, and attorneys' fees as provided by law.

II. PARTIES

3. Plaintiff Metrophones Telecommunications, Inc. ("Metrophones") is a payphone service provider with its headquarters and principal place of business located in Bellevue, Washington.

4. Plaintiff owns and operates one or more coin-operated and/or coinless payphones for use by the public. As defined by the FCC, Plaintiff is an independent PSP.

5. On information and belief, Defendant Global Crossing is a Michigan corporation with its principal place of business in New York. Unidentified Companies I through X are other subsidiaries and/or affiliates of Global Crossing. Inasmuch as the vast and complex structure of the Global Crossing family of companies makes it difficult to ascertain which particular affiliates are responsible to pay payphone compensation to Plaintiff, as alleged herein, Plaintiff reserves the right to amend its complaint to specifically name such responsible parties, upon ascertainment of the identity thereof. Upon information and belief, all Defendants have acted in concert with respect to

the matters alleged herein. As used hereinafter, the term "Global Crossing" refers to the affiliate or affiliates that are responsible for the payment of payphone compensation to Plaintiff, as alleged herein. Global Crossing regularly conducts business in the state of Washington.

6. Global Crossing is a common carrier as defined in 47 U.S.C. § 153(10). As such, Global Crossing is subject to regulation by the FCC under Title 47 of the United States Code.

7. Global Crossing provides various telecommunications services to the public through its telecommunications network that is accessible from Bellevue, Washington and elsewhere in Washington and the United States. Such services include the carriage over Global Crossing's telecommunications network of various types of calls placed from payphones, such as access code calls (calls made by first accessing Global Crossing's network through dialing a code number) and toll-free calls (calls for which the recipient has previously agreed to pay the toll charges).

III. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States. Further, 47 U.S.C. § 207 grants subject matter jurisdiction over this action to this Court.

9. Venue is proper in the United States District Court for the Western District of Washington, under 28 U.S.C. §§ 1391(b) and 1391(c), because Defendant Global Crossing is subject to personal jurisdiction in this district and hence, is deemed to reside in this district.

IV. PAYPHONE COMPENSATION UNDER FEDERAL LAW

10. As a PSP, Plaintiff makes its payphones available to the public to enable persons to make telephone calls. Plaintiff receives compensation for some types of payphone calls through direct payment by the caller (e.g. through the deposit of coins into the payphone) or through commission payments from Plaintiffs presubscribed carrier (the carrier to which operator-assisted calls are automatically routed by agreement between Plaintiff and such carrier). However, a substantial portion of calls placed from Plaintiff's payphones can be and are made without any compensation to Plaintiff from the caller or from Plaintiff's presubscribed carrier. Such calls include access code calls and toll-free calls (all of which shall be referred to hereinafter as "coinless" calls) that are initiated from Plaintiff's payphones and are routed over various carriers' telecommunications networks and facilities, including those of Global Crossing. For coinless calls, the interexchange carrier receives payment through various means, including the use of calling cards, credit cards, debit cards, prepaid cards, and calls billed to another party (e.g., collect, third-party, and toll-free calls).

11. In February, 1996, Congress enacted the Telecommunications Act of 1996 (the "Act"). In relevant part, the Act directed the FCC to prescribe regulations that "establish a per call compensation plan to ensure that all independent payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation." 47 U.S.C. § 276(b)(1)(A).

12. Pursuant to the Act, the FCC has promulgated regulations and has issued orders that require carriers, including Global Crossing, to pay payphone compensation to PSPs, such as Plaintiff, for all completed coinless calls made from a payphone where the caller utilizes a carrier other than the payphone's presubscribed carrier. Such coinless calls include, without limitation, (1) calls that are terminated on Global Crossing's own network, (2) calls that are initially routed by the local exchange carrier to Global Crossing's network, and (3) calls from Global Crossing's network that are routed to other carriers and/or resellers for completion. In particular, the FCC has promulgated the following regulation

> (a) Except as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code *or* subscriber toll-free payphone can is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract

47 CFR § 64.1300(a).

13. Pursuant to the Act, the FCC has issued orders establishing the default per call compensation rate (i.e. the rate that applies in the absence of a contract between the PSP and the carrier) at $.24 per call for all compensable calls made from and after April 21, 1999 rate aff'd sub Nom *American Pub Communications Counsel v FCC*, 215 F.3d 51 (D.C. Cir. 2000).

14. Pursuant to the Act, the FCC has promulgated regulations and has issued orders requiring each carrier, including Global Crossing, to track or arrange for the tracking of each compensable coinless call carried over its

network including, but not limited to, coinless calls completed by Global Crossing and coinless calls routed to Global Crossing's resellers and other interexchange carriers. In particular, the FCC has promulgated the following regulation

> (a) It is the responsibility of the first facilities-based interexchange carrier to which a compensable coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier to track, or arrange for the tracking of, each such call so that it may accurately compute the compensation required by § 64.1300(a). The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier must also send back to each payphone service provider at the time dial around compensation is due to be paid a statement in computer readable format indicating the toll-free and access code numbers that the LEC has delivered to the carrier, and the volume of calls for each toll-free and access number each carrier has received from each of that payphone service provider's payphones, unless the payphone service provider agrees to other arrangements.

47 C.F.R. § 1310(a).

15. Under FCC-approved procedures adopted by the telecommunications industry, PSPs, such as Plaintiff, provide to carriers, such as Global Crossing, or to their designated agent(s), on a calendar quarter basis, a list of the telephone numbers of the payphones owned and operated by the PSP as of the end of the applicable calendar quarter. Each such unique telephone number is referred to as an "ANI," which is the acronym for "Automatic

Number Identification." The ANI, which may also include payphone specific coding digits identifying as a payphone the telephone from which a call is made, is transmitted with each call made from a payphone, and is recorded and stored by the carrier to whose network the call is routed. The carrier can determine which calls carried over its network were made from which payphones by comparing the ANI lists submitted by a PSP to the carrier's call detail records or other records maintained by the carrier identifying the ANI for each recorded call. By such means, the carrier can also determine to whom payment of payphone compensation should be made, and the amount of such payment.

16. Plaintiff is able to determine, with a high degree of accuracy, the number of compensable coinless calls made from each of its payphones and routed to Global Crossing as the first facilities-based interexchange carrier. Such data are collected by a third party, Bulletins, to whose services Plaintiff subscribes.

17. Pursuant to FCC regulations, carriers are required to remit payment of payphone compensation to PSPs on a quarterly basis.

18. From January 29, 2002 to the date of this Complaint, many compensable coinless calls have been made from the payphones of Plaintiff, which have been routed by the applicable local exchange carrier to Global Crossing as the first facilities-based interexchange carrier.

19. Plaintiff has submitted its ANI lists to Global Crossing or its designated agent for the periods of the first quarter, 2002, to the third quarter, 2002, and will continue to submit their ANI lists to Global Crossing each calendar quarter thereafter.

20. Plaintiff has also submitted demands to Global Crossing for payment of the payphone compensation owed to it, in the form of invoices and other demands for payment.

21. Although Global Crossing has made some partial payments of payphone compensation to Plaintiff, Global Crossing has failed and refused to pay the full amount of payphone compensation owed to Plaintiff for the periods for which Plaintiff has submitted its ANT lists and invoices, in amounts to be proven at trial. Attached hereto as Exhibit A is a chart showing the amount payable by Global Crossing to Plaintiff for the period of the first quarter, 2002, through the third quarter, 2002, together with the amount paid and the balance owing, including interest.

22. Inasmuch as Global Crossing continues to accrue liability to pay payphone compensation to Plaintiff, Plaintiff reserves the right to amend its complaint prior to and/or after trial to allege the amounts owing as of the date of trial.

23. Despite sufficient demand from Plaintiff, Global Crossing's willful refusal to pay the full amount of payphone compensation to Plaintiff or to provide a proper accounting to Plaintiff has continued over many months and years. In the meantime, Global Crossing has reaped substantial profits from the calls placed from Plaintiff's payphones. Furthermore, Global Crossing has collected millions of dollars in payphone surcharges from its customers, which were imposed for the specific purpose of providing funds from which Global Crossing could make payment to the PSP of the payphone compensation Global Crossing owes to the PSP, including Plaintiff, yet Global

Crossing has failed and refused to pay over to Plaintiff the surcharges so collected.

FIRST CAUSE OF ACTION
VIOLATION OF TITLE 47, UNITED STATES CODE, AND REGULATIONS AND ORDERS OF THE FCC

24. Plaintiff realleges ¶¶ 1 through 23.

25. Global Crossing's failure and refusal to pay the full amount of payphone compensation owed to Plaintiff violates Section 276 of the Act and the regulations and/or orders issued by the FCC pursuant thereto.

26. Global Crossing's violations of Section 276 of the Act and the FCC regulations and orders requiring payment to Plaintiff of payphone compensation have caused substantial monetary damage to Plaintiff, in the amounts set forth on Exhibit A attached hereto and incorporated herein, such amounts to be proven at trial, together with such additional amounts as may accrue to the date of trial.

27. Under 47 U.S.C. § 206, Global Crossing is liable to Plaintiff for the full amount of damages sustained by Plaintiff in consequence of Global Crossing's violations of Section 276 of the Act and the FCC regulations and/or orders issued pursuant thereto.

28. The FCC has required that a carrier that fails to pay the full amount of payphone compensation by the required due date must pay interest on the unpaid balance at the rate of 11.25% per annum. Accordingly, Global Crossing owes Plaintiff prejudgment interest on the unpaid payphone compensation at the rate of 11.25%, beginning as of the first day of the quarter following the submission by Plaintiff to Global Crossing of an ANI list.

Alternatively, Global Crossing owes Plaintiff pre-judgment interest at the maximum rate permitted under applicable state law.

29. Global Crossing is liable for Plaintiff's reasonable attorneys' fees pursuant to 47 U.S.C. § 206.

SECOND CAUSE OF ACTION
QUANTUM MERUIT

30. Plaintiff realleges ¶¶ 1 through 29.

31. Plaintiff has rendered valuable business services to Global Crossing's benefit.

32. The value of Plaintiff's services rendered to Global Crossing has been set at 24 cents per call originated through Plaintiff's payphones via the "Dial Around" services described above Accordingly, as of the filing of this Complaint, Plaintiff is entitled to the amounts outlined on Exhibit A attached hereto.

33. Because Global Crossing has not compensated Plaintiff 24 cents per call for all calls routed over its network from plaintiff's payphones, Global Crossing has not only been unjustly enriched in the amounts outlined on Exhibit A, but should be required to pay interest at 11 25% per annum for late payment, pursuant to orders/regulations of the FCC.

34. Global Crossing is liable for Plaintiff's reasonable attorneys' fees pursuant to 47 U.S.C. § 206.

WHEREFORE, Plaintiff prays for judgment against Global Crossing as follows:

1. On the First Cause of Action, for all payphone compensation owed by Global Crossing to Plaintiff under regulations and orders of the FCC, in the amounts set forth on Exhibit A attached hereto, together with such additional amounts as may accrue to the date of the trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

2. On the Second Cause of Action, for the amounts set forth on Exhibit A attached hereto, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

V. DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issues that may be tried to a jury.

DATED this 17th day of March, 2003.

KELLER ROHRBACK L.L.P.

By /s/ David J. Russell
David J. Russell, WSBA #17289
Attorneys for Plaintiff
Metrophones Telecommunications, Inc.

Metrophones Telecommunications, Inc.
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(425) 869-7551

Statement of Account
As of 3-31-03

DESCRIPTION (PREVIOUSLY BILLED AND UNPAID DIAL AROUND) BY BULLETINS

Global Crossing Telecommunications, Inc.
180 S. Clinton Avenue
Rochester, NY 14646
(716) 777-8456

Period	Call Count	Rate	Due	Payments
1Q2002 (Jan. 28-Mar. 31)	35684	$0.24	$ 8,564.16	$4,455.48
2Q2002	56894	$0.24	$ 13,654.56	7,240.44
3Q2002	127664	$0.24	$ 30,639.36	$6,957.48

Percent	Disputed	Interest	Owed
52.02%	$1,026.48	$260.06	$3,342.26
53.03%	$1,596.00	$271.02	$5,089.14
22.71%	$1,409.28	$626.42	$22,899.02
		Total Due	**$31,330.42**

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

METROPHONES TELECOMMUNICATIONS, INC., a Washington corporation, Plaintiff, v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation, and UNIDENTIFIED COMPANIES I THROUGH X, Defendants.	No. C03-0694P PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR LEAVE TO AMEND COMPLAINT (Filed Oct. 20, 2003) **Note For Motion Calendar: October 24, 2003; Motion for leave to Amend Complaint – October 29, 2003**

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I. INTRODUCTION

Defendant Global Crossing Telecommunications, Inc. ("Global Crossing") is a long distance carrier based in Michigan. According to its own website, it had service revenue of $2,878,000,000 in 2002. Plaintiff Metrophones Telecommunications, Inc. ("Metrophones") is a small company located in Bellevue, Washington. Metrophones owns payphones located throughout the western United States.

Pursuant to 47 U.S.C. § 276 (and other sections of the Telecommunications Act of 1976 ("the Act")), Global Crossing must fairly compensate Metrophones and all other payphones service providers (or "PSPs") "for each and every completed intrastate and interstate call using their payphone. . . ." This lawsuit is about Global Crossing's failure to compensate Metrophones for approximately 130,000 calls that were placed from payphones owned by Metrophones and completed over Global Crossing's network.

Defendant's motion is a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Thus, for purposes of this motion, this Court must assume that *all* of the allegations in plaintiff's Complaint are true. *Ludahl v. Seaview Boat Yard, Inc.*, 869 F. Supp. 825, 826 (W.D. Wash. 1994). This means that this Court must assume that (1) Global Crossing has failed to pay Metrophones for approximately 130,000 calls that originated from Metrophones' payphones and were completed over Global Crossing's network; (2) the value of those telephone calls was and is 24¢ per call; and (3) Global Crossing has been unjustly enriched as a result of its failure to pay Metrophones for the telephone calls at issue. *See* Plaintiff's

Complaint at ¶¶ 21 and 31-34 and Ex. A thereto. In light of these necessary assumptions, Global Crossing's motion must be denied for at least three reasons. First, the recent opinion from a three-judge panel of the Ninth Circuit upon which Global Crossing's motion is based is the subject of a petition for *certiorari*, which will be filed in the near future. *See* the accompanying Declaration of Floyd A. Jensen (counsel for plaintiffs in *Greene v. Sprint Communications*, 340 F.3d 1047 (9th Cir. 2003) ("*Greene*"). Any ruling on the viability of plaintiff's first cause of action – which is based Global Crossing's violations of 47 U.S.C. § 276 – should be stayed pending the outcome of the plaintiffs' petition for *certiorari* in *Greene*.

Second, the three-judge panel's decision in the *Greene* case was simply wrongly decided. Section 207 of the Act specifies, in relevant part, that "[a]*ny person claiming to be damaged by any common carrier* . . . may either make complaint to the Commission as hereinafter provided for, or *may bring suit for the recovery of the damages for which the common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction.*" 47 U.S.C. § 207 (emphasis added). Thus, the language of § 207 of the Act directly contradicts the three-judge panel's decision that there is no express or implied private right of action for a violation of § 276 of the Act. *FCC's In re The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, FCC Docket No. 96-128 at ¶ 32 (October 3, 2003) (Ex. A hereto) ("[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of

the Act"); *Maydak v. Bonded Credit*, 96 F.3d at 1334 ("[i]f Maydak had sued AT&T [a common carrier] for a violation of a stated statutory provision, the district court clearly would have had subject matter jurisdiction under § 207"); *APCC Servs., Inc. v. Cable & Wireless, Inc.* ___ F. Supp. 2d ___, No. 02-0158, 2003 WL 22111268, at *4 (D.D.C. Sept. 3, 2003) (Ex. B hereto) ("the Court concludes that plaintiffs have a right of action to challenge defendant's alleged failure to meet the dial-around compensation obligations imposed by section 64.1300 [one of the FCC's implementing regulations], and will therefore deny C&W's 12(b) motion to dismiss").

Finally, Global Crossing's motion should be denied because (1) even if this Court were to find that Metrophones does not have a private right of action for Global Crossing's violation of § 276 (which was the only issue decided by the Ninth Circuit Court of Appeals in the *Greene* case), Metrophones should be permitted (and is hereby moving pursuant to Fed. R. Civ. P. 15(a)) to amend its complaint to add causes of action (a) for Global Crossing's alleged violations §§ 201, 407, and 416(c) of the Act; and (b) for Global Crossing's alleged breach of an implied contract, for an accounting, and for Global Crossing's alleged negligence (all state law causes of action); (2) plaintiff's original complaint included a viable state law claim for unjust enrichment; and (3) there can be no preemption of Metrophones' state law claims because those claims are not at all "inconsistent with the Commission's regulations"[1] – as would be required for this Court to dismiss (as Global Crossing is requesting) Metrophones'

[1] Defendant's Motion at p. 5, line 18.

state law claims *with prejudice.* For all of these reasons, plaintiff's motion for judgment on the pleadings must be denied.

II. FACTS

A. For Purposes of Defendant's Motion, All of the Allegations in Plaintiff's Complaint Must Be Accepted as True.

Global Crossing acknowledges, at page three of its motion, that whenever a defendant (such as Global Crossing) files a Rule 12(c) motion for judgment on the pleadings, the Court must assume that "the non-moving party's material facts are true as pleaded."[2] Thus, for purposes of this motion, it must be assumed that "Global Crossing has failed and refused to pay the full amount of payphone compensation owed to Plaintiff for the periods for which Plaintiff has submitted ANI lists and invoices, in amounts to be proven at trial." Plaintiff's Complaint at ¶ 21. It also must be assumed that "[t]he value of Plaintiff's services rendered to Global Crossing has been set at .24 [sic] cents per call originated through Plaintiff's payphones via the "Dial Around Services described above" and that "Global Crossing has . . . been unjustly enriched in the amounts outlined on Exhibit A." Plaintiff's Complaint at ¶¶ 32-33.

At the time that the undersigned signed and filed plaintiff's Complaint, he attached a "Statement of Account" that alleged that Global Crossing had failed to pay Metrophones $31,330.42 for previously billed and unpaid "dial around" phone calls placed from payphones owned by

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[2] Defendant's Motion at p. 3, lines 8-13.

Metrophones.[3] In addition, Metrophones outlined the number of completed calls for which Global Crossing had paid Metrophones and the number (approximately 130,000) of completed calls for which Global Crossing had simply refused to pay. *See* Ex. A to Plaintiff's Complaint. Again, for purposes of the present motion, all of these allegations have been accepted by Global Crossing – for purposes of the present motion – as being true.

B. Defendant Itself Has Asserted a State Law Claim for Alleged Unjust Enrichment.

In its recitation of the "facts" in the present motion, Global Crossing mentioned, but did not emphasize, that its own counterclaims (which it asserted in this matter on April 22, 2003) include a state law counterclaim for unjust enrichment.[4] Thus, when it brought its own counterclaims, Global Crossing did not believe that state law claims were somehow preempted by the Telecommunications Act. Given Global Crossing's own assertion of an unjust enrichment claim, Global Crossing should be estopped from arguing – as it has at pp. 4-6 of its current motion – that "Section 276 [of the Act] preempts claims such as quantum meruit based in state law."[5]

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[3] "Dial around" phone calls are those placed from a pay phone where the caller uses a toll-free number or some other number for which the caller is not required to deposit coins into the pay phone. Under the Telecommunications Act, the carrier that has the "dial around" call at issue must compensate the owner of the payphone for such calls. *See* 47 U.S.C. § 276.

[4] Defendant's Answer, Affirmative Defenses and Counterclaims at p. 11, lines 4-15.

[5] Defendant's Motion at p. 6, lines 7-8.

III. ARGUMENT

A. The Plaintiffs in the Greene v. Sprint Matter Have Filed Petition for *Certiorari.*

Global Crossing's motion for judgment on the pleadings (directed to plaintiff's original complaint) is based almost entirely upon an opinion recently issued by a three-judge panel of the Ninth Circuit Court of Appeals – *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003) – a opinion that was issued on *August 25* of this year. This opinion is still being appealed by the plaintiffs in *Greene*. Although the Ninth Circuit Court of Appeals recently denied plaintiffs' motion for a rehearing en banc, the plaintiffs in *Greene* will be filing a petition for *certiorari* in the United States Supreme Court in the near future. *See* the accompanying Declaration of Floyd A. Jensen at ¶ 3.

Because the law in this area is not settled and because the *Greene* decision is still being appealed, Metrophones respectfully asks this Court to postpone any decision in this matter that might be based upon the three-judge panel's decision in *Greene* pending the outcome of plaintiffs' petition for *certiorari* in *Greene* matter. The undersigned will endeavor to notify this Court as soon as he is notified of a ruling on plaintiffs' petition for *certiorari* in the *Greene* matter.

B. The Three-Judge's Panel's Decision in *Greene* Was Wrongly Decided.

Postponing a ruling on the private right of action (under § 276 of the Act) issue is important because the decision of the three-judge panel in *Greene* was simply wrongly decided. It was wrongly decided because there are

two independent bases for finding a private right of action for recovery of payphone compensation under Section 276. First, Sections 206 and 207 of the Act – 47 U.S.C. §§ 206 & 207 – expressly provide a private right of action for violations of the Act and the FCC's implementing regulations. Thus, Global Crossing's failure to pay the compensation required by Sections 64.1300-01 of the FCC's rules and by 47 U.S.C. 276 is actionable under Sections 206 and 207 of the Act. Second, under the governing test announced by the Supreme Court, there must be an implied right of action under Section 276 of the Act. Both points were confirmed by the FCC on October 3, 2003 (six weeks *after* the three-judge panel issued its decision in *Greene*) when it issued an order in which it specified that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, *constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.*" *FCC's In re The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, FCC Docket No. 96-128 at ¶ 32 (October 3, 2003) (Ex. A hereto) (emphasis added). This recent ruling is important because it is black letter law that "the construction of a statute by those charged with its administration [as the FCC was charged by § 276(a) of the Act] is entitled to substantial deference." *United States v. Rutherford*, 442 U.S. 544, 553 (1979).

1. Sections 206 And 207 Provide An Express Cause Of Action Against Global Crossing For Its Violations Of The Act And The FCC's Implementing Regulations.

Congress, in enacting Sections 206 and 207 of the Act, expressly authorized suits against carriers (such as Global

Crossing) for violations of the Act.[6] The Supreme Court has held that violations of federal agency regulations (such as the FCC's regulations requiring payments from carriers to PSPs for all completed calls) can be enforced through private actions to the same extent as the statute they implement. *Alexander v. Sandoval*, 532 U.S. 275 (2001). In addition, the Ninth Circuit Court of Appeals has previously held that violations of the Act are actionable under Sections 206 and 207. *See Maydak v. Bonded Credit Co., Inc.*, 96 F.3d 1332 (9th Cir. 1996).

(a) It is "meaningless" to talk about a cause of action under 47 C.F.R. §§ 64.1300-01 in isolation from Section 276.

In an effort to defeat plaintiff's clear right of action under Sections 206 and 207, Global Crossing only focuses on the *Greene* decision and argues that the *Greene* decision stands for the proposition that "there is no private right of action, either explicitly [sic] or implied, under Section 276 of the Telecommunications Act."[7] This argument ignores the fact that Metrophones' first cause of action is for "Global Crossing's violations of Section 276 of the Act *and*

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[6] Section 206 provides that if a common carrier "shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter." 47 U.S.C. § 206. Section 207 then affords the injured party the opportunity to "bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court or the United States of competent jurisdiction." 47 U.S.C. § 207.

[7] Defendant's Motion at p. 3, lines 17-18.

the FCC regulations and/or orders issued pursuant thereto."[8] In enacting Section 276, Congress explicitly conferred on PSPs a new right to be "fairly compensated for each and every completed intrastate and interstate call using their payphone. . . ." 47 U.S.C. § 276(b)(1)(A). Rather than attempt to micromanage the details of that compensation scheme, however, Congress left implementation to the FCC, and ordered the agency to adopt regulations within nine months. 47 U.S.C. § 276(b)(1). The regulations adopted by the FCC in furtherance of that mandate, including 47 C.F.R. §§ 64.1300-01, are thus functionally a part of the statute itself. The regulations implement Congress' statutory mandate through powers expressly delegated to the FCC:

> As with the . . . regulations [at issue in *Alexander*], "it is meaningless to talk about a separate cause of action to enforce" the FCC regulation at 47 C.F.R. § 64.1300 apart [from] its authorizing statute, 47 U.S.C. § 276(b)(1)(A). A suit to enforce the rights of PSPs under § 276(b)(1)(A) to be "fairly compensated" would be meaningless without the FCC regulation which specifies the precise level of that compensation.

Precision Pay Phones v. Qwest Communications Corp., 210 F. Supp. 2d 1106, 1115 (N.D. Cal. 2002), *quoting Alexander*, 532 U.S. at 284. The touchstone under *Alexander* for whether agency regulations are encompassed within a private right of action to enforce violations of their parent statute is whether the regulations "authoritatively construe the statute itself." 532 U.S. at 284. Here, 47 C.F.R. §§ 64.1300-01 do *more* than "authoritatively construe"

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[8] Plaintiff's Complaint at ¶ 27 (emphasis added).

Section 276 – the regulations, as directed by Congress, provide the entire substance of the right created by Congress. Without the regulations, the right to fair compensation would be meaningless, and without the statute, the regulations would be groundless. Thus, the proper inquiry is not whether a violation of Section 276, standing alone, or a violation of its implementing regulations, on their own, is actionable under Sections 206 and 207. Rather, the proper inquiry is whether there is a cause of action under the comprehensive scheme set forth by Congress, including both Section 276 and the regulations it charges the FCC with adopting to meet Congress' directive that PSPs receive "fair[] compensation." *Precision Pay Phones*, 210 F. Supp. 2d at 1115 ("the right of action conferred under §§ 206 and 207 applies not only to [Section 276] but to implementing the FCC regulations as well").

If there were no private right of action under Sections 206/207, then Section 276's mandate that PSPs receive fair compensation would be illusory. Otherwise, the statutory scheme, would lead to the illogical result that the PSPs could not bring an enforcement proceeding even before the FCC. The only enforcement mechanism available would be an FCC-initiated action against a carrier. The FCC, however, is not in a position to police the hundreds of carriers paying compensation to thousands of PSPs and, even if it were, there is no mechanism by which it could recover monies owed by the carriers to PSPs. Any fines it can levy for violations of the Act and its rules are paid to the United States Treasury, not to parties damaged by carrier violations. 47 U.S.C. § 504. Thus, PSPs would have no means of redressing Global Crossing's failure to comply with the statutory mandate, implemented through the FCC regulations, entitling Metrophones and all other

PSPs to fair compensation. This cannot be the law in this area.

(b) Violations of FCC regulations implementing the Act are enforceable through Sections 206/207 to the same extent as the underlying statutory provision they implement.

Even if the regulations are viewed in isolation, the Supreme Court in *Alexander* made clear that federal agency regulations can be enforced through private actions. There, the Court held that regulations implementing the ban on intentional discrimination set forth in Section 601 of Title VI of the Civil Rights Act of 1964 "are covered by the cause of action to enforce that section." *Alexander*, 532 U.S. at 284-85. It so held because "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 284[9]; *see Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 536 (9th Cir. 1984) ("[I]f the rule in question is valid and furthers the substantive purposes of the enabling statute, and the statute provides a private right of action as a matter of congressional intent, we will imply the private right of action into the rule as well.").

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[9] While the Court ultimately held that the regulations were not enforceable, it did so because they were not limited to intentional discrimination and, therefore, exceeded the scope of the agency's statutory authorization. *Alexander*, 532 U.S. at 285-86. The FCC regulations at issue here, 47 C.F.R. §§ 64.1300-01, by contrast unquestionably are within the scope of the authorizing statute.

The D.C. Circuit in *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995) applied this general rule (that agency regulations can be enforced through private actions to the same extent as the statute they implement) to FCC regulations implementing the Communications Act. In *MCI*, the Court of Appeals held that a violation of the maximum rates of return set by the FCC was a violation of Section 201's requirement that rates be "just and reasonable," and, therefore, was actionable under Sections 206/207. 59 F.3d at 1413-14. Thus, under both *Alexander* and *MCI*, Metrophones may assert a private right of action for Global Crossing's violation of the FCC's regulations (even if there is no express private right of action outlined in § 276 of the Act itself).

2. Alternatively, There Is An *Implied* Private Right Of Action Under Section 276.

Not only is there an express right of action for violations of Section 276 and the FCC's implementing regulations under Sections 206/207, the Act's general private right of action provisions, but an implied private right of action exists **directly** under Section 276 itself. In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Supreme Court established a four factor test to determine whether an implied right of action for violation of a statute exists: (1) whether the plaintiff is part of "the class for whose especial benefit the statute was enacted;" (2) whether there is **any** indication of "legislative intent, explicit or implicit, either to create such a remedy or to deny one;" (3) whether inferring such a right is "consistent with the underlying purposes of the legislative scheme;" and (4) whether the "cause of

action is one traditionally relegated to state law." All of the *Cort* factors are satisfied in this case.

First, PSPs are "the class for whose especial benefit [Section 276] was enacted." Section 276 declares that its express purpose is "to promote competition among PSPs and promote the widespread deployment of payphones," and that, in order to meet those dual objectives, the FCC "shall . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. . . ." 47 U.S.C. § 276(b)(1). Thus, not only was Section 276 enacted for the benefit of the PSPs, but the very means it provides for their protection is the subject of this lawsuit. *See Precision Pay Phones*, 210 F. Supp. 2d at 1115 (Section 276 "creates a right to fair compensation and focuses specifically on the individuals to be protected – 'all payphone service providers' ").

Second, while the legislative history of Section 276 is silent with respect to whether Congress intended "either to create . . . a remedy [for violation of Section 276] or to deny one," it is implicit in the statute's purpose and structure that Congress intended to create one. The Supreme Court "has found that Congress intended to create a cause of action 'where the language of the statute explicitly confers a right directly on a class of persons that includes the plaintiff in the case.' " *Universities Research Ass'n. v. Coutu*, 450 U.S. 754, 771-72 (1981), *quoting Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979) (where the Court in that footnote also noted that "the right – or duty – creating language of [a] statute has generally been the most accurate indicator of the propriety of implication of a cause of action"). Section 276 confers just such

a right directly on the PSPs – the right to be fairly compensated for every call.

Third, inferring a private right of action here not only is "consistent with the underlying purposes of the legislative scheme," but is particularly appropriate if the newly-created right is to be adequately protected. As discussed above, if no private right of action is available to remedy violations of Section 276, Congress' directive that PSPs be "fairly compensated" would be illusory. Moreover, as noted above, the right to fair compensation under Section 276 cannot be divorced from Sections 206/207 of the Act, which provide for rights of action against carriers for violations of the Act. In mandating "fair compensation" for "each and every call," Congress was aware that, under an earlier statute, 47 U.S.C. § 226(e), the FCC had **already** imposed a payphone compensation obligation on carriers, albeit for only some, but not all dial-around calls. Given the existence of Sections 206/207, providing for private rights of actions against carriers for violations of the Act, it must be presumed that Congress intended, or at the very least was accepting of, the notion that a violation of Section 276 would be enforceable against carriers. *See Precision Pay Phones*, 210 F. Supp. 2d at 1115 (the existence of Sections 206/207 is probative of Congress' intent to create a private right of action against carriers under Section 276). Had Congress intended to create a right without a remedy, it would have made that intention clear and excluded PSPs from the class of persons entitled to invoke Sections 206/207. In addition, courts may infer congressional intent to allow an implied remedy where, as here, a remedy is "necessary or at least helpful to the accomplishment of the statutory purpose." *Cannon v. Univ. of Chicago*, 441 U.S.

at 703 (finding that the Court is "decidedly receptive" to such a remedy).

Finally, the fourth *Cort* factor is satisfied because the cause of action here is not one "traditionally relegated to state law, in an area that is basically the concern of the states. . . ." *Cort*, 422 U.S. at 78. Indeed, the payphone compensation obligation at issue is entirely a creature of federal law.

For all of these reasons, Metrophones believes that the three-judge panel's decision in *Greene* was wrongly decided and will be reversed (if, and when, plaintiffs' petition for *certiorari* is granted) by the United States Supreme Court. In light of the significant body of law in Metrophones' favor on this issue, Metrophones again asks this Court to postpone – pending the outcome of plaintiffs' petition for *certiorari* in *Greene* matter – any decision that might be based upon the three-judge panel's decision in *Greene*.

C. There Is No Preemption Here

Even if this Court feels compelled to immediately implement the narrow holding of the three-judge panel in *Greene* (on the issue of whether there is a private right of action under § 276 of the Act), Global Crossing's motion also requests that this Court dismiss, *with prejudice*, all state law claims that Metrophones might assert against it for its admitted – for purposes of this motion – failure to pay Metrophones for approximately 130,000 in compensable calls. This second half of Global Crossing's motion is completely without merit.

Taken as a whole, Global Crossing's motion asks this Court to dismiss Metrophones' cause of action under § 276 of the Act and *then* asks this Court to dismiss all of Metrophones' state law causes of action *with prejudice*. Thus, Global Crossing would have this Court hold that (1) it can fail to pay PSPs for compensable calls; and (2) the PSPs cannot sue Global Crossing for that failure to pay in either federal court or in state court. Such an outcome should be unpalatable to this Court.

At page five of its motion, Global Crossing acknowledges that the preemption language of the Act only specifies that state law is preempted "[t]o the extent that any State requirements are *inconsistent* with Commission's regulations."[10] *See* § 276(c) of the Act. Global Crossing then cites *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), as if that case supports a finding of preemption in this case. It does not.

The *Illinois* case is a case in which the plaintiffs were challenging the FCC's authority to set rates for *intrastate* local coin calls. In other words, in the *Illinois* case, there was no question but that the plaintiffs claim (if sustained) would have been completely inconsistent with the FCC's regulations. Indeed, the decision in the *Illinois* case upon which Global Crossing's motion is based is nothing more than a jurisdictional decision. The Court of Appeals there merely held that "[b]ecause . . . there is no indication that the Congress intended to exclude local coin rates from the term 'compensation' in § 276, we hold that *the statute unambiguously grants the Commission authority to regulate*

[10] Defendant's motion at p. 5, lines 17-19 (emphasis added).

the rates for local coin calls." 117 F.3d at 562 (emphasis added).

By contrast, Metrophones' state law causes of action[11] are not at all inconsistent with the provisions of the Act or with the FCC's implementing regulations and Global Crossing has made no attempt to demonstrate or argue that they are. Global Crossing's motion also fails to recognize the existence of the Act's "savings clause," which can be found at 47 U.S.C. § 414. That provision specifies that "[n]othing in this chapter shall in anyway abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." When faced with the same preemption issue that is before this Court, the District Court in *Precision Pay Phones* (210 F. Supp. 2d 1106 (N.D. Cal. 2002)), held that:

> Clearly § 414 is intended to preserve state law to the extent feasible. Thus, while [] § 276(b)(1)(A) of the Telecommunications Act may be enforced in a suit in federal court, there is nothing to suggest Congress intended this mode of enforcement to be to the exclusion of claims in state courts. As demonstrated by the limited scope of the preemption provision of § 276(c) and the savings clause of § 414, state court enforcement was not of such "central concern to the federal statute," *Franchise Tax Board*, [463 U.S. 1, 25-26 (1983)], so as to evince Congress' intent to completely displace state court jurisdiction over suits to collect dial-around compensation.

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[11] Metrophones asserted an unjust enrichment claim in its original complaint and has asserted three additional state law causes of action in its amended complaint.

210 F. Supp. 2d at 1117. Metrophones respectfully submits that any application of the "inconsistent with the Commission's regulations" language of § 276(c) to the state law causes of action outlined in Metrophones' amended complaint confirms that those causes of action are viable causes of action and are not preempted by the Act. Again, for purposes of this motion, it must be assumed that Global Crossing has failed to pay for approximately 130,000 compensable dial around calls made from payphones owned by Metrophones. A cause of action asserting that Metrophones is entitled to recover in equity for those compensable calls (pursuant to an unjust enrichment or breach of implied contract cause of action) is not at all consistent the FCC's implementing regulations that provide that "the first facilities-based interexchange carrier [such as Global Crossing] to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call . . . at a per-call rate of $.24." 47 C.F.R. § 64.1300(a) and (c).

In short, even if this Court were to decide that Metrophones does not have a private right of action under § 276 of the Act and the FCC's implementing regulations, Metrophones should be allowed to proceed (either in this Court or in state court) with a cause of action in equity for the recovery of funds that are assumed – for purposes of this motion – to be due and owing. *See Precision Pay Phones*, 210 F. Supp. 2d 1106; *Braco v. MCI WorldCom Communications, Inc.*, 138 F. Supp. 2d 1260, 1269 (C.D. Cal. 2001); *Heichman v. American Tel. & Tel. Co.*, 943 F. Supp. 1212, 1222 (C.D. Cal. 1995) (finding that the Telecommunications Act did not transform the Plaintiff's state law causes of action into a federal cause of action);

Boyle v. MTV Networks, Inc., 766 F. Supp. 809, 816 (N.D. Cal. 1991) (finding that neither the Telecommunications Act's statutory language nor its legislative history supports the proposition that Congress intended complete preemption).

D. Metrophones' Motion for Leave to File and Serve the Attached Amended Complaint.

In addition to opposing Global Crossing's motion to dismiss its claims with prejudice, Metrophones respectfully asks that this Court grant it leave to file and serve the amended complaint that is attached hereto as Exhibit B.[12] Pursuant to Fed. R. Civ. P. 15(a), "[l]eave [to amend a complaint] shall be freely given when justice so requires." This is exactly the type of situation where justice requires that leave be given to file an amended complaint. When Metrophones filed its initial complaint, neither the Ninth Circuit Court of Appeals (nor any district court within the Ninth Circuit to the undersigned's knowledge) had held that there was no private right of action under § 276 of the Act and/or the FCC's implementing regulations.[13] The attached amended complaint simply asserts causes of action for Global Crossing's alleged violation of §§ 201, 407, and 416(c) of the Act – none of which were at issue in the *Greene* matter. In addition, the attached amended

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[12] Metrophones has filed a separate motion to shorten time to ensure that its Motion for Leave to File Amended Complaint can be heard at the same time as Global Crossing's motion.

[13] Indeed, the original order in the *Greene* case was entered *sua sponte* and the defendant (Sprint) did not file an opposition brief when that order was appealed to the Ninth Circuit Court of Appeals. At oral argument before the Ninth Circuit, no one argued that a private right of action does not exist. Declaration of Floyd A. Jensen at ¶ 4.

complaint asserts state court causes of action for Global Crossing's breach of an implied contract, for an accounting, and for Global Crossing's negligence. As outlined above, none of these state court causes of action are inconsistent with the provisions of the Act.

1. Metrophones' Amended Complaint States A Claim For Violation Of 47 U.S.C. § 407 and 416(c).

In its proposed amended complaint, Metrophones has asserted, among others, causes of action for Global Crossing's alleged violations of Section 407 and 416(c) of the Act, which provide, in pertinent part, that:

> [47 U.S.C. § 407] If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.
>
> . . . .
>
> [47 U.S.C. § 416(c)] It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply

> with such [Commission] orders so long as the same shall remain in effect.

Thus, Section 407 of the Act provides persons with the right to file a District Court action to enforce an FCC "order" for the payment of money. In *APCC, Inc. v. Allnet Communications Serv., Inc.*, No. 93-0034, 1993 WL 544300 (D.D.C. Dec. 20, 1993), *vacated on other grounds*, 959 F. Supp. 19 (D.D.C. 1997) – a case almost identical to the one before this Court – the American Public Communications Council ("APCC"), brought suit under Section 207 (as well under Section 207 for violation of Section 416) for the non-payment of dial – around compensation. Allnet moved to dismiss, *inter alia*, on the ground that the word "order" in Section 407 includes only adjudicatory orders. After extensive briefing, Judge Oberdorfer not only denied Allnet's motion to dismiss, but entered summary judgment in APCC's favor. 1993 WL 544300 at **1-2.

As for Section 416(c), that section also makes violations of FCC orders violations of the Act. *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Commission*, 744 F.2d 1107, 1117, n.18 (5th Cir. 1984), *vacated on other grounds*, 476 U.S. 1166 (1986) ("Violating rules and regulations of the FCC . . . is violative of the Act.") (*citing* 47 U.S.C. § 416(c)). Because violations of FCC orders are a violation of the Act, Metrophones can seek damages Global Crossing's failure to pay pursuant to Sections 416(c), 206 and 207. Although Global Crossing may try to argue that the word "orders" in Section 416(c) refers to adjudicatory orders only, and does not encompass orders promulgated pursuant to the FCC's rulemaking authority, this is not the law in this Circuit. *See Hawaiian Tel. Co. v. Public Util. Comm'n.*, 827 F.2d 1264, 1271-72 (9th Cir. 1987), *cert.*

denied, 487 U.S. 1218 (1988). The court in *Hawaiian Tel.* reasoned that,

> [T]he language of other sections of the Communications Act shows that Congress did not intend to limit § 401(b) exclusively to adjudicatory orders as the APA defines them. When Congress intended the APA's definition of a given term to be incorporated into the Communications Act, it said so. E.g., 47 U.S.C. §§ 409(a)-(c) (incorporating APA's definition of adjudication).

827 F.2d at 1271. Since the APA's definition of "orders" is not incorporated into Section 416(c), this Court, like the large majority of circuit Courts,[14] should interpret the term broadly to include orders promulgated pursuant to the FCC's rulemaking authority.

Finally, in another case that is virtually identical to the case before this Court, the District Court for the District of Columbia very recently granted a plaintiff's motion to amend its complaint to add causes of action under for a carrier's alleged violations of sections 407 and 416(c). *APCC Servs., Inc. v. Cable & Wireless, Inc.*, ___ F. Supp. 2d ___, No. 02-0158, 2003 WL 22111268, at *6 (D.D.C. Sept. 3, 2003) (Ex. B hereto) ("[t]his Court agrees that the word 'order' should not be so narrowly construed,

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[14] *Utel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 308 (6th Cir. 1990); *Cheasapeake & Potomac Tel. Co. v. Public Serv. Comm'n*, 748 F.2d 879, 880-81 (4th Cir. 1984), *vacated on other grounds*, 476 U.S. 445 (1986); *South Cent. Bell v. Louisiana*, 744 F.2d at 1115; *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n.*, 740 F.2d 566, 571 (7th Cir. 1984); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901 (8th Cir. 1984), *vacated on other grounds*, 476 U.S. 1167 (1986). *See also MGC Communications, Inc. v. BellSouth Telecomm. Inc.*, 146 F. Supp. 2d 1344, 1353 (S.D. Fla. 2001).

and believes that a violation of FCC regulations regarding dial-around compensation is the kind of violation that Congress intended to prescribe [sic] when it enacted sections 416(c) and 407").

In conclusion, orders promulgated pursuant to the FCC's rulemaking authority are encompassed within Section 407 and Section 416(c)'s language. The *Pay Tel Reclassification and Compensation Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-388, Report and Order, 11 FCC Red. 20541 (FCC 1996) and subsequent related FCC orders, require long distance companies, including Global Crossing, to pay money, i.e., dial-around compensation, to PSPs for all compensable calls. These orders are "orders[s] for the payment of money" that can be enforced in United States district court pursuant to causes of action under Sections 407 and 416(c) of the Act.

2. Metrophones' Amended Complaint Also States A Claim for Global Crossing's Alleged Violation of 47 U.S.C. § 201(b).

Finally, Metrophones' Amended Complaint states a claim for Global Crossing's alleged violation of Section 201(b) of the Act. That section provides, in relevant part, that:

> All charges, practices, classifications, and regulations for and in connection with such communication service [to be provided by common carriers such as Global Crossing] shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable *is declared to be unlawful.*

47 U.S.C. § 201(b) (emphasis added). When combined with the provisions of sections 206 and 207 of the Act – which expressly allow a PSP to file suit in federal court "[i]n case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful" – the language of section 201(b) of the act requires a carrier (such as Global Crossing) to conduct itself in a just and reasonable way. If it does not act in a just and reasonable way, a person or entity harmed the carrier's conduct may bring a federal action (as authorized by sections 206 and 207). *In re The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 at ¶ 32 (FCC October 3, 2003) (Ex. A hereto) ("[a] *failure to pay in accordance with the Commission's payphone rules*, such as the rules expressly requiring such payment that we adopt today, *constitutes* both a violation of section 276 and *an unjust and unreasonable practice in violation of section 201(b) of the Act*") (emphasis added); *APCC v. Cable & Wireless*, ___F. Supp. 2d ___, No. 02-0158, 2003 WL 22111268 (Ex. B hereto) ("although the section 201(b) claim appears not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276 and its implementing regulations, the Court will allow this amendment").

IV. CONCLUSION

For all the reasons outlined above, Global Crossing's motion for judgment on the pleadings should be denied in its entirety. In addition, Metrophones' motion for leave to amend its complaint (Ex. C hereto) should be granted.

DATED this 20th day of October, 2003.

KELLER ROHRBACK L.L.P.

By /s/ David J. Russell
David J. Russell, WSBA #17289
Attorneys for Plaintiff Metrophones Telecommunications, Inc.

EXHIBIT C

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

METROPHONES TELE-COMMUNICATIONS, INC., a Washington corporation, Plaintiff, v. GLOBAL CROSSING TELE-COMMUNICATIONS, INC., a Michigan corporation, and UNIDENTIFIED COMPA-NIES I THROUGH X, Defendants.	No. C03-0694P PLAINTIFF'S AMENDED COMPLAINT

Plaintiff Metrophones Telecommunication, Inc. ("Metrophones") (hereinafter referred to as "Plaintiff") complains of Defendant Global Crossing Telecommunications, Inc. ("Global Crossing") and Unidentified Companies I through X (jointly referred to herein as "Defendants") as follows:

INTRODUCTION AND SUMMARY OF COMPLAINT

1. Under 47 U.S.C. § 276(b)(1)(A), 47 C.F.R. §§ 1300 et seq., and various orders of the Federal Communications Commission ("FCC") in Common Carrier Docket No. 96-128, Defendants, as carriers of various types of long distance communications, are required to compensate Plaintiff, as a payphone service provider ("PSP"), at the rate prescribed by the Federal Communications Commission ("FCC"), for each

and every compensable call, including but not limited to completed access code calls and toll free calls, that have been made at any time since January 29, 2002 from a payphone owned by Plaintiff and carried over Defendants' telephone network facilities. Such compensation is referred to herein as "per call compensation." Under certain circumstances specified by FCC orders, Defendants may pay Plaintiff per phone compensation in lieu of per call compensation. As used herein, the term "payphone compensation" includes both per call compensation and per phone compensation.

2. Many compensable calls placed from payphones owned by Plaintiff have been carried over Defendants' telephone networks, but Defendants have failed and refused to provide Plaintiff a full accounting of such calls, and have failed and refused to pay Plaintiff the full amounts of payphone compensation required to be paid under federal law, despite Plaintiff's, demands. Plaintiff seeks an accounting of the amounts of payphone compensation owed by Defendants for all compensable calls, and judgment for such amounts, interest, costs, and attorneys' fees as provided by law.

PARTIES

3. Plaintiff Metrophones is a payphone service provider with its headquarters and principal place of business located in Bellevue, Washington.

4. On information and belief, Defendants Global Crossing is a Michigan Corporation. Unidentified Companies I through X are other subsidiaries and/or affiliates of Defendants. Inasmuch as the complex structure of Defendants' family of companies makes it difficult to

ascertain which particular affiliates are responsible to pay payphone compensation to Plaintiff, as alleged herein, Plaintiff reserves the right to amend its complaint to specifically name such responsible parties, upon ascertainment of the identity thereof. Upon information and belief, all Defendants have acted in concert with respect to the matters alleged herein. As used hereinafter, the term "Defendants" refers to the affiliate or affiliates that are responsible for the payment of payphone compensation to Plaintiff, as alleged herein. Defendants do business in Washington and elsewhere in the United States.

5. Defendants are a common carrier as defined in 47 U.S.C. § 153(10). As such, Defendants are subject to regulation by the FCC under Title 47, U.S.C.

6. Defendants provide various telecommunications services to the public through its communications network that is accessible from Washington and elsewhere in the United States. Such services include the carriage over Defendants' telecommunications network of various types of calls placed from payphones, such as access code calls (calls made by first accessing Defendants' network through dialing a code number) and toll free calls (calls to a number, typically dialed in the pattern 1-800-xxx-xxxx, 1-888-xxx-xxxx, or 1-877-xxx-xxxx, for which the subscriber has previously agreed to pay the toll charges).

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, because this action arises under the laws of the United States. Further, 47 U.S.C. § 207 grants subject matter jurisdiction of this action to this court.

8. Venue is proper in the United States District Court for the Western District of Washington, under 28 U.S.C. §§ 1391(b) and 1391(c), because Defendants are subject to personal jurisdiction in this district and hence are deemed to reside in this district.

PAYPHONE COMPENSATION UNDER FEDERAL LAW

9. As a PSP, Plaintiff makes its payphones available to the public to enable persons to make telephone calls. Plaintiff receives compensation for some types of payphone calls through direct payment by the caller (e.g. through the deposit of coins into the payphone) or through commission payments from Plaintiff's presubscribed carrier (the carrier to which 0+ calls are automatically routed by agreement between Plaintiff and such carrier). However, a substantial portion of calls placed from Plaintiff's payphones can be and are made without any compensation to Plaintiff from the caller or from Plaintiff's presubscribed carrier. Such calls include access code calls and toll free calls (all of which shall be referred to hereinafter as "coinless" calls) that are initiated from Plaintiff's payphones and are routed over various carriers' telecommunications networks and facilities, including those of Defendants. For coinless calls, the interexchange carrier receives payment through various means, including the use of calling cards, credit cards, debit cards, prepaid cards, and calls billed to another party (e.g., collect, third party, and toll free calls). Plaintiff is prohibited by law from blocking such calls from their payphones.

10. In February, 1996, Congress enacted the Telecommunications Act of 1996 (the "Act"). In relevant part,

the Act directed the FCC to prescribe regulations that "establish a per call compensation plan to ensure that all independent payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation." 47 U.S.C. § 276(b)(1)(A).

11. Pursuant to the Act, the FCC has promulgated regulations and has issued orders that require carriers, including Defendants, to pay payphone compensation to PSPs such as Plaintiff for all completed coinless calls made from a payphone where the caller utilizes a carrier other than the payphone's presubscribed carrier. Such coinless calls include, without limitation, calls that are terminated on Defendants' own network and calls that are initially routed by the local exchange carrier to Defendants' network, and from Defendants' network are routed to other carriers and/or resellers for completion.

12. Pursuant to the Act, the FCC has issued orders establishing the default per call compensation rate (i.e. the rate that applies in the absence of an express contract between the PSP and the carrier) at $0.24 per call for all compensable calls made from and after April 21, 1999.

13. Pursuant to the Act, the FCC has promulgated regulations and has issued orders requiring each carrier, including Defendants, to track or arrange for the tracking of each compensable coinless call carried over its network.

14. Under FCC-approved procedures adopted by the telecommunications industry, PSPs, such as Plaintiff, provide to carriers, such as Defendants, or to their designated agent(s), on a calendar quarter basis, a list of the

telephone numbers of the payphones owned and operated by the PSP as of the end of the applicable calendar quarter ("ANI Lists"). Each such unique telephone number is referred to as an "ANI," which is the acronym for "Automatic Number Identification." The ANI is transmitted with each call made from a payphone, and is or should be recorded and stored by the carrier to whose network the call is routed. Other information is also transmitted to the carrier with each call, and such information may include payphone specific coding digits identifying as a payphone the telephone from which a call is made. The carrier can determine which calls carried over its network were made from which payphones by comparing the ANI Lists submitted by PSPs to the carrier's call detail records or other records maintained by the carrier identifying the ANI for each recorded call. By such means, the carrier can also determine to whom payment of payphone compensation should be made, and the amount of such payment.

15. Pursuant to FCC regulations, carriers, including Defendants, are required to remit payment of payphone compensation to PSPs on a quarterly basis.

16. Defendants also sell long distance service to other entities that resell such service, but do not own or lease their own switching facilities, and which are sometimes referred to as "switchless resellers." Under FCC orders and regulations, Defendants are responsible for payment of payphone compensation for all compensable calls routed to their switchless resellers.

17. Defendants also sell long distance service to other entities that resell such service, using their own switching facilities, and which are sometimes referred to as "facilities-based resellers" ("FBRs") or "switch-based

resellers" (SBRs"). Under FCC orders and regulations, Defendants are responsible for payment of payphone compensation for all compensable calls routed to their FRBS/SBRs except where a FBR/SBR has come forward and identified itself as being responsible for paying payphone compensation. To date, no FBR/SBR of Defendants have identified itself to Plaintiff as being responsible for paying payphone compensation.

18. From January 29, 2002 to the date of this Complaint, many compensable coinless calls have been made from the payphones of each Plaintiff, which have been routed by the applicable local exchange carrier to Defendants as the first facilities-based interexchange carrier. Some of such calls have been routed by Defendants to one or more resellers (both switchless resellers and FBRS/SBRs) for completion.

19. Plaintiff (through its agent, Bulletins) has submitted their ANI Lists to Defendants, or their respective designated agent or agents, for the calendar quarters beginning with the first quarter of 2002, and will continue to so submit their ANI Lists each calendar quarter hereafter.

20. Plaintiff (through its agent, Bulletins) has also submitted demands to Defendants for payment of the payphone compensation owed to them, in the form of invoices and other demands for payment.

21. Defendants have failed to track all compensable calls placed from Plaintiff's payphones as required by regulations and orders of the FCC.

22. Although Defendants have made some partial payments of payphone compensation to Plaintiff, Defendants

have failed and refused to pay the full amount of payphone compensation owed to Plaintiff for the periods for which Plaintiff has submitted their ANI Lists and invoices, in amounts to be proved at trial.

23. Inasmuch as Defendants continue to accrue liability to pay payphone compensation to Plaintiff, Plaintiff reserves the right to amend their complaint prior to and/or after trial to allege the additional amounts that will have accrued prior to the date of trial.

FIRST CAUSE OF ACTION VIOLATION OF TITLE 47, UNITED STATES CODE, AND REGULATIONS AND ORDERS OF THE FCC

24. Plaintiff realleges ¶¶ 1 through 23.

25. Defendants' failures and refusal to (1) track compensable calls, from Plaintiff's payphones; and/or (2) pay the full amount of payphone compensation owed to Plaintiff violates Section 276 of the Act and the regulations and/or orders issued by the FCC pursuant thereto.

26. Defendants' violations of Section 276 of the Act and the FCC regulations and orders requiring payment to Plaintiff of payphone compensation have caused substantial monetary damage to Plaintiff, in amounts to be proven at trial.

27. Under 47 U.S.C. § 206, Defendants are liable to Plaintiff for the full amount of damages sustained by Plaintiff in consequence of Defendants' violations of Section 276 of the Act and the FCC regulations and/or orders issued pursuant thereto.

28. The FCC has required that a carrier that fails to pay the full amount of payphone compensation by the required due date must pay interest on the unpaid balance at the rate established by the Internal Revenue Service pursuant to 26 U.S.C. § 6621 (the "IRS Rate"). Accordingly, Defendants owe Plaintiff pre-judgment interest on the unpaid payphone compensation at the IRS rate, beginning as of the first day of the quarter following the submission by Plaintiff to Defendants of an ANI list. Alternatively, Defendants owe Plaintiff pre-judgment interest at the maximum rate permitted under applicable state law.

29. Defendants are liable for Plaintiff's reasonable attorneys' fees under 47 U.S.C. § 206.

SECOND CAUSE OF ACTION
VIOLATION OF 47 U.S.C. § 201

30. Plaintiff realleges paragraphs 1 through 29.

31. Pursuant to applicable orders and regulations promulgated by the FCC, Defendants are required to track calls placed from Plaintiff's payphones and routed by Defendants to their FBRs/SBRs, and to provide the tracking information, identification of FBRs/SBRs, and contact information concerning the FBRs/SBRs, to Plaintiff to enable Plaintiff to pursue collection from the FBRs/SBRs of amounts of payphone compensation for which the FBRs/SBRs are responsible.

32. Defendants have failed to track all calls from Plaintiff's payphones that have been routed to Defendants' FBRs/SBRs, and/or have failed to provide to Plaintiff the tracking information, including but not limited to

the identity of and contact information for the reseller for each such call routed to a FBR/SBR.

33. Defendants' failures to track compensable calls and to provide tracking information to Plaintiff, as well as Defendants' failure to pay the full amount of payphone compensation owing, constitute unjust or unreasonable practices and/or an omission to do what the FCC orders and regulations require Defendants to do, all of which is unlawful under 47 U.S.C. § 201(b).

34. Plaintiff has suffered substantial damages as a proximate result of Defendants' unlawful acts and/or omissions, as alleged herein, the precise amount of which will be shown at trial.

35. Pursuant to 47 U.S.C. § 206, Defendants are liable to Plaintiff for the full amount of damages sustained in consequence of Defendants' unlawful practices, as alleged herein, including prejudgment interest, together with a reasonable attorneys' fees.

THIRD CAUSE OF ACTION FOR PAYMENT OF MONEY UNDER 47 U.S.C. § 407

36. Plaintiff realleges paragraphs 1 through 35.

37. The orders and regulations of the FCC relating to payphone compensation constitute orders for the payment of money by interexchange carriers including Defendants, to payphone service providers, including Plaintiff, within the scope and meaning of 47 U.S.C. § 407.

38. Pursuant to 47 U.S.C. § 407, 47 C.F.R. §§ 64.1300 *et seq.*, and the related orders of the FCC pertaining to payphone compensation, Defendants owe Plaintiff damages

for the compensable calls placed from Plaintiff's payphones and carried over Defendants' facilities for which Defendants have not paid payphone compensation, together with prejudgment interest and reasonable attorneys' fees.

FOURTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. § 416(C)

39. Plaintiff realleges paragraphs 1 through 38.

40. The orders and regulations of the FCC relating to payphone compensation constitute "orders" within the scope and meaning of 47 U.S.C. § 416(c).

41. Section 47 U.S.C. § 416(c) requires the Defendants to comply with all such FCC "orders."

42. By failing to track compensable calls, failing to provide tacking information to Plaintiff, and failing to pay the full amount of payphone compensation owing, Defendants have violated FCC "orders" pertaining to payphone compensation.

43. Pursuant to 47 U.S.C. § 416(c), Defendants are liable to Plaintiff for the full amount of damages sustained as a result of Defendants violations of 47 U.S.C. § 416(c), together with prejudgment interest and reasonable attorneys' fees.

FIFTH CAUSE OF ACTION
UNJUST ENRICHMENT

44. Plaintiff realleges paragraphs 1 through 43.

45. By permitting callers to use Plaintiff's payphones to place calls over Defendants' network, Plaintiff has performed services impliedly requested by Defendants, and have conferred an economic benefit on Defendants, which Defendants have willingly accepted, in that by completing calls received from Plaintiff's payphones, Defendants earn substantial revenue and profits from such calls.

46. Defendants knew or should have known that by accepting, transporting, and completing calls placed from Plaintiff's payphones, they were receiving an economic benefit in the form of revenues and profits received by reason of such calls, and that Plaintiff expected and were entitled to be compensated for such calls.

47. By receiving the economic benefits of calls placed from Plaintiff's payphones without compensating Plaintiff, Defendants have been unjustly enriched at the expense of Plaintiff.

48. Defendants should be equitably required to compensate Plaintiff for the reasonable value of the services performed by Plaintiff that have benefited Defendants.

49. Defendants are liable to Plaintiff for the reasonable value of the benefits conferred on Defendants, plus prejudgment interest thereon at the maximum rate allowed by law, and reasonable attorney fees.

SIXTH CAUSE OF ACTION
IMPLIED CONTRACT

50. Plaintiff realleges ¶¶ 1 through 49.

51. By making its payphones available to members of the general public to place coinless calls that could be carried by Defendants, Plaintiff impliedly offered to Defendants the use of their payphones by customers of Defendants to place calls over Defendants' networks, thus enabling Defendants to reap the benefits of providing their own customers with the ability to place calls from Plaintiff's payphones. Such benefits included the revenue and profits derived from such calls, as well as the good will generated by providing a convenient service to Defendants' customers. Plaintiff offered such service on the condition and in the expectation that Defendants would compensate Plaintiff at the rates established by the FCC, and under the conditions set by the FCC, including but not limited to the payment of interest on unpaid payphone compensation.

52. By accepting, transporting, and completing calls made from Plaintiff's payphones by Defendants' customers, Defendants impliedly accepted Plaintiff's offer of service.

53. Plaintiff provided adequate consideration to Defendants, by making their payphones available for Defendants' customers to place coinless calls for which Plaintiff would receive no compensation from Defendants' customers, yet the payphones would be unavailable for use by paying customers while in use by Defendants' customers during such coinless calls. In addition, by making their payphones available for use by Defendants' customers, Plaintiff conferred an economic benefit on Defendants,

enabling Defendants to receive the revenue and profits from coinless calls placed by Defendants' customers.

54. As a result of the foregoing, an implied contract was created between each Plaintiff and each Defendants whose customers used that Plaintiff's payphones to place calls that were accepted, transported, and completed by the Defendants.

55. Defendants have breached the implied contracts by failing to pay the full amount of compensation owing.

56. Plaintiff is entitled to damages for breach of the implied contracts, plus interest thereon at the rate set by the FCC or at the highest rate allowed by state law, and reasonable attorneys' fees.

SEVENTH CAUSE OF ACTION NEGLIGENCE

57. Plaintiff realleges ¶¶1 through 56.

58. Pursuant to applicable orders and regulations promulgated by the FCC, Defendants are required, and therefore have a legal duty, to track calls placed from Plaintiff's payphones and routed by Defendants to their facilities based resellers, and to provide the tracking information, identification of facilities based resellers, and contact information concerning the facilities based resellers, to Plaintiff to enable Plaintiff to pursue collection from the facilities based resellers of amounts of payphone compensation for which the facilities based resellers are responsible.

59. Defendants have negligently failed to perform one or more of their legal duties set forth in the preceding paragraph.

60. As a proximate result of Defendants' negligent breach of their legal duties as set forth above, Plaintiff has been damaged in amounts to be proved at trial, including but not limited to damages resulting from the inability to pursue collection of payphone compensation from Defendants' facilities based resellers.

61. Defendants are liable to Plaintiff for the damages suffered by reason of Defendants' negligent failure to perform their legal duties as set forth above, together with prejudgment interest at the highest rate allowed by law.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. On the First Cause of Action, for all payphone compensation owed by Defendants to Plaintiff under rules, regulations, and orders of the FCC, the exact amount of which will be proven at trial, together with prejudgment interest at the IRS rate, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

2. On the Second Cause of Action, for damages proximately resulting from Defendants' unjust and unreasonable practices as alleged herein, the exact amount of which will be proven at trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

3. On the Third Cause of Action, for damages proximately resulting from Defendants' failure to pay money as ordered by the FCC, as alleged herein, the exact amount of which will be proven at trial, prejudgment interest at the maximum rate and for the maximum period allowed by

law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

4. On the Fourth Cause of Action for damages proximately resulting from Defendants' violations of 47 U.S.C. § 416(c), the exact amount of which will be proven at trial, prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

5. On the Fifth Cause of Action, for the reasonable value of the economic benefits conferred on Defendants by Plaintiff as alleged herein, which will be established at trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

6. On the Sixth Cause of Action, for damages for breach of implied contract, measured by the rates set by the FCC for payphone compensation, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, costs of court, reasonable attorneys' fees, and such other relief as the Court deems just

7. On the Seventh Cause of Action, for damages proximately caused by Defendants' negligence, the exact amount of which will be proven at trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, costs of court, and such further relief as the Court deems just.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issues that may be tried to a jury.

DATED this 20th day of October, 2003.

KELLER ROHRBACK L.L.P.

By _____
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No. 05-705

IN THE
Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether 47 U.S.C. § 201(b) of the Communications Act of 1934 creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states: Global Crossing Telecommunications, Inc., is an indirect, wholly owned subsidiary of Global Crossing Limited, a Bermuda corporation. Global Crossing Limited, in turn, is more than 10 percent owned by STT Crossing, Ltd., a wholly owned subsidiary of Singapore Technologies Telemedia, Pte., a Singapore entity that is wholly owned by the Government of Singapore.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 423 F.3d 1056 (9th Cir. 2005), and is reproduced at Pet. App. 1a-39a. The relevant opinion of the district court is unpublished and is reproduced at Pet. App. 40a-58a.

JURISDICTION

The Ninth Circuit issued its opinion on September 8, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

47 U.S.C. § 201(a) provides: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such routes."

47 U.S.C. § 201(b) provides in relevant part: "All charges, practices, classifications, or regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . . The Commission may prescribe such rules and regulations as may

be necessary in the public interest to carry out the provisions of this chapter."

47 U.S.C. § 206 provides in relevant part: "In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter . . . ."

47 U.S.C. § 207 provides in relevant part: "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter . . . may bring suit for the recovery of the damages for which such common carrier shall be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction."

47 U.S.C. § 276(b)(1) provides in relevant part: "In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."

The FCC's relevant payphone compensation regulations are set forth in the Addendum to this brief.

STATEMENT

This case concerns the ability of a party to bring a private cause of action based on alleged violations of certain FCC regulations, when the underlying statutory scheme, the

Communications Act of 1934, 48 Stat. 1064, provides that only *statutory* violations are remediable in federal court. The Ninth Circuit, disagreeing with a prior D.C. Circuit opinion, held that such a private cause of action does indeed exist. Failing to abide by FCC regulations, the Ninth Circuit reasoned, can also be conceptualized as violating the general prohibition in section 201(b) of the Act against certain "unjust or unreasonable" communications practices. The issue presented here is whether the Ninth Circuit's decision allows through the back door the sort of cause of action that Congress has barred from coming through the front.

1. Historically, payphone service providers often blocked callers' attempts to use access codes (such as 800 numbers or "10-10-220") to make "coinless" calls from payphones. These codes allow consumers to make payphone calls without placing any money in the phones by "dialing around" the payphone service providers' preselected (and usually high-priced) long distance carriers. In 1990, however, Congress passed a law requiring payphone service providers to allow consumers to make such coinless calls. *See* Telephone Consumer Services Improvement Act, Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226); 47 U.S.C. § 226(c)(1)(B). At the same time, Congress directed the FCC to consider whether payphone service providers should be compensated in some way for those "dial-around" calls. 47 U.S.C. § 226(e)(2). The FCC responded by deciding that long distance carriers that transmit such calls should compensate payphone service providers for some but not all of them. *See Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation*, 6 F.C.C.R. 4736, 4745-46 ¶¶ 34, 36 (1991), *recon.*, 7 F.C.C.R. 3251, 3259 ¶ 50 (1992). As a result, payphone service providers were not able to obtain any payment for a substantial portion of coinless calls.

Against this backdrop, Congress directed the FCC in the Telecommunications Act of 1996, Pub. L. No. 104-104, 100

Stat. 56, to create "a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). After considering several alternatives – most notably, mulling over whether callers themselves or their long distance carriers should compensate payphone service providers for coinless calls – the FCC ultimately adopted what is sometimes called a "carrier pays" plan. Long distance carriers that carry coinless payphone calls must compensate payphone service providers each time their customers make such a call. *See* 47 C.F.R. §§ 64.1300-1340;[1] *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 566-57 (D.C. Cir. 1997) (upholding this determination). The FCC recognized that callers, not carriers, are the "cost causers" when a coinless call is placed and that, as the "primary economic beneficiar[ies]" of the practice, the callers "should bear the burden of paying compensation for these calls." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 F.C.C.R 20,541, 20,586 ¶ 86 (1996) (hereinafter "*1996 Payphone Order*"). Nonetheless, the Commission elected to adopt the "carrier pays" system "in order to maintain the convenience of coinless calling upon which the public has come to rely." *Illinois Pub. Telecomm.*, 117 F.3d at 567. Long distance carriers can then "recover their own costs" by billing or contracting in advance with the callers. *1996 Payphone Order* at 20,584 ¶ 83.

The FCC's regulations specify a default compensation rate, unless the payphone service providers and long distance carriers contractually agree to other arrangements. 47 C.F.R. § 64.1300. That rate has changed over time, and continues to change, but at all times relevant to this case it was $0.24 per call. *See id.* § 64.1300(c); *American Pub. Commc'n Council v.*

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[1] The relevant regulations, as they existed at the time Respondent filed its complaint, are reproduced in the Addendum to this brief.

FCC, 215 F.3d 51, 53-54 (D.C. Cir. 2000) (detailing the various rate changes and upholding $0.24 rate). The regulations also require carriers to track coinless payphone calls, report them to payphone service providers, make payments on a quarterly basis, and submit their systems to rigorous audits.

2. Over the past several years, numerous payphone service providers have filed complaints against long distance carriers, seeking compensation allegedly due under the FCC's regulations. While many payphone service providers have brought these complaints in FCC administrative proceedings, others have filed lawsuits in various federal courts across the country. These lawsuits invoke the right in sections 206 and 207 of the Communications Act of 1934 – which envelops the Telecommunications Act of 1996, *see AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377 (1999) – to seek damages in federal court for violations of "this chapter." 47 U.S.C. §§ 206, 207.

Federal courts uniformly have recognized, however, that while sections 206 and 207 allow private actions to remedy violations of the Act's *statutory* provisions, they say nothing about any right to bring suits in federal court to enforce agency regulations. *See, e.g., APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238, 1246 (D.C. Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050 & n.2 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). And nothing in section 276 of the 1996 Act itself requires long distance carriers to compensate payphone owners for coinless calls. That section, courts have emphasized, merely directs the FCC to adopt some form of regulatory plan – not necessarily a "carrier pays" type plan. *See, e.g., APCC Servs.*, 418 F.3d at 1246; *Greene*, 340 F.3d at 1050-52; *Phonetel Techs. v. Network Enhanced Telecomm.*, 197 F. Supp. 2d 720, 721-22

(E.D. Tex. 2002). Nor does section 276 specify any particular compensation rate.

Nonetheless, payphone service providers have attempted to manufacture more indirect legal theories for enforcing the FCC regulations in court. One such theory gives rise to the current dispute.

3. In late 2001, Respondent Metrophones Communications, Inc., an owner and operator of payphones headquartered in Washington State, brought separate lawsuits in the United States District Court for the Western District of Washington against several long distance carriers, including Petitioner Global Crossing Telecommunications, Inc. Respondent alleged that for several years, Petitioner had failed to provide a proper accounting and to compensate it fully for coinless calls transmitted via Petitioner's network. Respondent sought a judgment requiring an accounting and payment of amounts owed since the second quarter of 1999. Respondent and Petitioner do not have a contract with respect to coinless calls, so Respondent relied on the FCC's regulation setting a default rate of $0.24 per call.

Before litigation respecting the 2001 complaint got underway in earnest, Petitioner filed for bankruptcy. The district court then entered an order staying Respondent's case against Petitioner.

In early 2003, Respondent filed a new complaint relating to Petitioner's post-bankruptcy payments for the first three quarters of 2002. J.A. 4-15. The 2003 complaint alleged that during that period, Respondent paid on average only about $0.10 per coinless call, resulting in a shortfall (including accrued interest) of $31,330.42 in damages. J.A. 15.

Respondent initially grounded its 2003 complaint (like its original one) in section 276. After the Ninth Circuit confirmed in another case that this provision did not give rise to a private

cause of action, *Greene*, 340 F.3d at 1053, Respondent moved to amend its complaint to assert that sections 201(b), 407, and 416(c) of the Act permitted it to seek compensation in federal court. J.A. 39-44, 54-56. It also advanced several state-law theories for recovery. J.A. 57-60. Petitioner moved to dismiss the case on the ground that Respondent's complaint failed to state a cause of action and that all proposed amendments likewise would be futile.

The district court dismissed Respondent's section 276 claim but allowed it to amend its complaint, ruling that sections 201(b) and 416(c) – though not section 407 – create private causes of action to recover underpayments for coinless calls. Pet. App. 51a-53a. It also allowed Petitioner to proceed with state law claims for *quantum meruit*, breach of implied contract, and negligence. Pet. App. 46a-50a, 56a. Acknowledging that its rulings raised issues on which there is a "substantial ground for difference of opinion," Pet. App. 61a, the district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b).

4. Respondent and the other long distance carriers Petitioner had sued all filed appeals in the Ninth Circuit. Shortly thereafter, Respondent settled its cases with all of the carriers except for Petitioner.

The Ninth Circuit accepted Petitioner's appeal and affirmed in part and reversed in part. Turning first to Respondent's federal causes of action, the Ninth Circuit noted that Respondent no longer contended that section 276 gave rise to a private cause of action, Pet. App. 9a n.4, and it rejected the district court's holding that section 416(c) did so. Pet. App. 22a-23a. But, expressly creating a circuit split with the D.C. Circuit, *see* Pet. App. 13a n.5, the Ninth Circuit held that section 201(b)'s general prohibition against certain "unjust and unlawful" communications "practices" gives rise to a private

cause of action to recover for violations of the FCC's payphone compensation rules. Pet. App. 6a-21a.

In so holding, the Ninth Circuit gave *Chevron* deference to a recent order in which the FCC asserted, in a single sentence with no analysis, that a violation of its payphone compensation regulations would be enforceable in federal court because it would violate section 201(b), which broadly declares that certain "unjust and unreasonable" communications practices are "unlawful." Pet. App. 11a-14a (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 F.C.C.R. 19,975 (2003) (hereinafter "*2003 Payphone Order*")). The Ninth Circuit claimed in a footnote that the FCC's remark in the *2003 Payphone Order* supported Respondent's cause of action for violations of the FCC's *regulations* because "[a] Congress that intends [a] statute to be enforced through a private cause of action intends [an] authoritative interpretation of the statute to be so enforced as well." Pet. App. 21a n.8 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001)) (emphasis removed).

Turning to Respondent's state law claims, the Ninth Circuit held that section 276(c) of the Act, which prohibits any state requirements inconsistent with the federal regime, preempts Respondent's negligence claim but does not preempt its claims for *quantum meruit* or breach of implied contract. Pet. App. 24a-38a.

5. Petitioner filed a petition for a writ of certiorari raising two questions: (1) whether section 201(b) gives rise to a private cause of action under which payphone owners may sue long distance carriers for alleged violations of FCC regulations; and (2) whether section 276 preempts payphone service providers' state law claims for *quantum meruit* and breach of implied contract. This Court granted certiorari on the first question presented. 126 S. Ct. 1329 (2006).

SUMMARY OF ARGUMENT

Section 201(b) of the Communications Act of 1934 does not give rise to a private cause of action to seek redress for alleged violations of the FCC's payphone compensation regulations.

A. The private cause of action in sections 206 and 207 of the Communications Act gives plaintiffs the right to seek damages only for common carriers' violations of provisions of *the Act*, not for violations of regulations. Numerous provisions in the Act and other federal laws show that when Congress wants to create a private cause of action to enforce regulations, it knows how to do so and does so explicitly. Yet sections 206 and 207 are silent with respect to alleged violations of FCC regulations. This silence must be taken as a congressional decision to bar federal court cases based merely on violations of regulations, especially in light of the fact that other provisions of the Act provide for administrative enforcement of regulations such as those at issue here. Respondent is thus in the same position as a plaintiff bringing suit pursuant to an implied cause of action: it may assert violations of the statutory scheme, but not merely of regulations. *Compare Alexander v. Sandoval*, 532 U.S. 275 (2001).

B. Contrary to the Ninth Circuit's ruling, failing to pay a payphone service provider in accordance with the FCC's payphone compensation regulations does not also violate section 201(b).

1. This Court's decisions make clear that a private cause of action is based on a *statutory* violation – as opposed to a violation of a regulation – only when it is based on the express terms of a statute. No matter how consistent a regulation may be with the policy or directives of a statutory scheme, violating the regulation does not constitute a statutory violation unless the statute itself prohibits the alleged action.

2. Section 201(b) itself does not address, much less prohibit, anything with respect to compensating payphone service providers for coinless calls. That section simply declares unlawful any "charges, practices, classifications, and regulations for and in connection with [interstate and foreign wire or radio] communication service" that are "unjust or unreasonable." It is section 276, not section 201(b), that specifically addresses payphone compensation. But all section 276 does is require the FCC to create some kind of regulatory plan to ensure that payphone service providers are compensated for coinless calls – not necessarily even a plan under which long distance carriers must pay such compensation. If section 276 does not require carriers to compensate payphone service providers for coinless calls, then the generalized language of section 201(b) cannot be read as doing so either.

3. The FCC's statement in its *2003 Payphone Order* that payphone service providers may bring federal court actions for damages based on violations of the payphone compensation regulations because such violations constitute an "unjust and unreasonable practice" under section 201(b), does not alter this analysis. This statement, for two independent reasons, is not the type of agency pronouncement that is eligible for *Chevron* or any other kind of deference. First, the statement fundamentally concerns whether a private right of action exists, and agencies are not entitled to deference when they opine respecting the scope of federal judicial power. The federal courts, not regulatory agencies, are the experts in that realm. Second, the FCC's statement does not evince any deliberation or provide any explanation as to why violations of payphone regulations would violate section 201(b). Agency declarations that are unaccompanied by any reasoning whatsoever are not entitled to deference.

Even if the FCC's statement were eligible for some kind of deference, none would be warranted here, for the statement

goes beyond any meaning that section 201(b) can bear. The only "practices" covered by section 201(b) are (i) those in connection with furnishing "interstate and foreign" communication service, and (ii) those involving service to customers. The FCC's proffered construction of section 201(b), however, contravenes both of these limitations. First, it would apply that section to *intra*state service, since both section 276 and the FCC regulations apply to intrastate, as well as interstate, coinless calls. Second, the FCC's construction would apply section 201(b) far beyond carrier-customer relations, making the section a virtual catch-all for any actions carriers take in violation of any FCC regulations.

There can be little doubt that Congress would not have sanctioned that result. Not only does the Act's private cause of action provision restrict lawsuits to alleged *statutory* violations, but it envisions that the FCC will centralize disputes over regulatory issues, using its powers and expertise to develop coherent nationwide communications policy. This would be nearly impossible if federal judges across the country were left to create a patchwork of inconsistent duties and obligations for our country's common carriers.

ARGUMENT

SECTION 201(B) DOES NOT GIVE RISE TO A PRIVATE CAUSE OF ACTION IN FEDERAL COURT FOR VIOLATIONS OF THE FCC'S PAYPHONE COMPENSATION REGULATIONS.

It is, by now, hornbook law that it is the province of Congress – and *only* Congress – to create a private cause of action to enforce a substantive right in federal court. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (available remedies are limited to those "that Congress enacted into law"). Thus, "[t]he question of the existence of a statutory

cause of action is, of course, one of statutory construction." *Touche Ross*, 442 U.S. at 568; *accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). And the *sine qua non* of this inquiry is congressional intent. *Transamerica*, 444 U.S. at 15-16; *Northwest Airlines Inc. v. Transport Workers Union of America*, 451 U.S. 77, 91 (1981). Absent evidence that Congress intended a certain right to be privately enforceable in federal court, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87; *accord California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."). Applying customary tools of statutory construction makes it clear that 47 U.S.C. § 201(b) does not give rise to a private cause of action for violations of the FCC's payphone compensation regulations.

A. The Communications Act Provides A Private Cause Of Action Only For Violations Of The Act's *Statutory* Provisions.

Both the text and structure of the Communications Act dictate that the Act limits private causes of action to those seeking damages for *statutory* violations. Private plaintiffs may not seek redress in federal court for violations merely of *regulations* promulgated to carry out statutory objectives. *See* PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.14.3 (2d ed. 1999) ("The section 206 right of action encompasses only claims that a carrier has violated the *Act*, not for example, violations of FCC regulations or general tort or contract claims.") (emphasis in original) (footnotes omitted).

1. "[A]s with any case involving the interpretation of a statute, [the] analysis must begin with language of the statute itself." *Touche Ross*, 444 U.S. at 568; *see also City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339 (1994).

Sections 206 and 207 of the Communications Act expressly create a private cause of action to obtain damages for violations of "the provisions of this chapter" – that is, violations of statutory provisions.[2] The text of those sections, however, does not provide any cause of action to redress violations of FCC *regulations* promulgated pursuant to the Act.

This textual void speaks volumes because "[i]n the absence of strong indicia of a contrary congressional intent, [this Court is] compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). There are no such indicia of a contrary intent here. In fact, other provisions of the Act explicitly provide private causes of action for violations of "regulations," thus demonstrating that when Congress wanted to create such remedial avenues, "it had little trouble doing so." *Pinter v. Dahl*, 486 U.S. 622, 650 (1988).

Two examples will suffice. First, section 227(b) makes it unlawful to make certain kinds of automatic or prerecorded phone calls and directs the FCC to "prescribe regulations to implement the requirements of this subsection." 47 U.S.C. §§ 227(b)(1) & (2). That section also expressly creates a private cause of action for "a violation of this subsection *or the regulations* prescribed under this subsection." *Id.* § 227(b)(3)(A) (emphasis added). Second, section 227(c) directs the FCC to prescribe regulations to protect residential telephone subscribers from unwanted telephone solicitations. *Id.* §§ 227(c)(1) & (2). That section also expressly provides that people who receive phone calls "in violation of the[se]

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[2] By "this chapter," these provisions refer to chapter 5 of the Communications Act, 47 U.S.C §§ 151-615b. Section 206 provides that a common carrier that violates a provision of the Act is liable to injured persons for the full amount of damages sustained as a result. 47 U.S.C. § 206. Section 207 provides that an injured person may file a complaint with the FCC or file suit in federal district court. 47 U.S.C. § 207.

regulations" may, under certain circumstances, bring suit for damages. *Id.* § 227(c)(5) (emphasis added).[3]

The presence of these provisions in the very statutory scheme at issue here confirms that the absence in sections 206 and 207 of any reference to regulations should not be taken as congressional oversight or indifference. "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago*, 511 U.S. at 338 (quotation marks omitted); *accord Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-34 (1975). Accordingly, the absence of any reference to regulations in sections 206 and 207 is affirmative proof that those provisions do not allow private damages suits based merely on alleged violations of regulations.

Strictly limiting private causes of action under the Act to those with a statutory foundation comports with Congress's craftsmanship in other statutory schemes as well. Numerous other statutory schemes expressly create private causes of action to redress violations of agency regulations, thus removing any lingering doubt that "when Congress wishe[s] to provide a private damage remedy," for violations of regulations, it does so "expressly." *Touche Ross*, 442 U.S. at

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[3] Other remedial provisions of the Act also expressly include violations of regulations within their reach. For example, parts of section 312 empower the FCC to take certain enforcement actions for a broadcaster's "failure to observe any provision of this chapter *or any rule or regulation of the Commission* authorized by this chapter or by a treaty ratified by the United States." 47 U.S.C. § 312(a)(4) (emphasis added); *see also id.* § 312(b) (allowing enforcement "[w]here any person . . . has violated or failed to observe any of the provisions of this chapter . . . [or] has violated or failed to observe *any rule or regulation of the Commission* authorized by this chapter") (emphasis added).

572. Acts that explicitly provide private causes of action to enforce regulations include:

- The Americans with Disabilities Act, which authorizes "any person alleging discrimination on the basis of disability in violation of any provision of this chapter, *or regulations* promulgated under section 12116 of this title" to bring suit in federal court. 42 U.S.C. § 12117(a) (emphasis added); *see also* 42 U.S.C. § 2000e-5(f);

- The Resource Conservation and Recovery Act, which authorizes any person to bring suit "against any person . . . alleged to be in violation of any permit, standard, *regulation*, condition, requirement, or order which has become effective pursuant to this chapter." 42 U.S.C § 6972(a)(1)(A) (emphasis added);

- The Migrant and Seasonal Agricultural Worker Protection Act, which authorizes suit by "[a]ny person aggrieved by a violation of this chapter *or any regulation* under this chapter." 29 U.S.C. § 1854(a) (emphasis added);

- The Endangered Species Act, which authorizes suit by "any person . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter *or regulation* issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A) (emphasis added).

In these situations – that is, "when a statute has provided a general authorization for private enforcement of regulations" – this Court has explained that regulations with "rights creating" language may be privately enforceable. *Sandoval*, 532 U.S. at 291; *see also Three Rivers Ctr. for Indep. Living, Inc. v. Housing Auth. of Pittsburgh*, 382 F.3d 412, 423 (3d Cir. 2004) ("Congress may . . . explicitly establish a private right of action to enforce regulations"). "But it is most certainly incorrect to

say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Sandoval*, 532 U.S. at 291. That principle governs here.

2. The overall enforcement scheme of the Communications Act confirms that sections 206 and 207 do not allow private plaintiffs to seek redress in federal court for violations of the FCC's regulations. In recognition of Congress's prerogative to decide when to create private causes of action, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica*, 444 U.S. at 19 (quotation marks omitted); *accord Karahalois v. Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 533 (1989) (same); *Touche Ross*, 442 U.S. at 574 (Court is "extremely reluctant" to sanction cause of action "significantly broader than the remedy that Congress chose to provide"); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies").

This is especially so when Congress "make[s] express provision for private enforcement in certain carefully defined circumstances, and provide[s] for enforcement at the instance of the Federal government in other circumstances." *Northwest Airlines Inc. v. Transport Workers Union of America*, 451 U.S. 77, 93-94 (1981). This confluence of factors "strongly evidences an intent *not* to authorize additional remedies." *Id.* at 94 (emphasis added); *see also Sandoval*, 532 U.S. at 290 ("one method of enforcing substantive rules suggests that Congress intended to preclude others"); *Mertens*, 508 U.S. at 254 ("statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly") (quotation marks omitted) (emphasis in original). Indeed, "[t]he presumption that a remedy was deliberately

omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Mass. Mutual Life Ins. v. Russell*, 473 U.S. 134, 147 (1985) (quotation marks omitted). *Accord Northwest Airlines*, 451 U.S. at 94 ("It is . . . not within [courts'] competence . . . to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress.").

Here, Congress has created just such an integrated system of procedures for enforcement. In the Communications Act, "Congress established a comprehensive system for the regulation of communication by wire and radio." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 6 (1942). And, "the enforcement of the Communications Act is entrusted primarily to an administrative agency" – namely, the FCC. *New England Tel. & Tel. Co. v. Public Utilities Comm. of Maine*, 742 F.2d 1, 5 (1st Cir. 1984) (Breyer, J.) (quotation marks omitted). *See also United Telephone Co. of the Carolinas, Inc. v. FCC*, 559 F.2d 720, 723 (D.C. Cir. 1977) ("The purpose of the Act is to protect the public interest rather than to provide a forum for the settlement of private disputes.").

Specifically, section 276(b)(1)(A)'s directive "to ensure that all payphone service providers are fairly compensated" for coinless calls, combined with the FCC's general authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," 47 U.S.C. § 201(b), gives the FCC ample authority to resolve compensation disputes that arise between payphone service providers and long distance carriers. Title V of the Act authorizes the FCC to assess forfeitures against carriers that the agency determines have "willfully or repeatedly failed to comply with any of the provisions of this chapter or any rule, *regulation*, or order issued by the Commission under this chapter . . . ." 47 U.S.C. §§ 503(b)(1)(B) & (2)(B) (emphasis added). The Act also gives the FCC the power to issue orders

to enforce its regulations. *See* 47 U.S.C. § 154(i) (authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968) (section 154(i) grants "the administrative process . . . sufficient flexibility to adjust itself to the dynamic aspects" of the industry) (quotation marks omitted).

The FCC, in fact, already has established detailed procedures that allow payphone service providers to seek administrative resolutions of disputes just like this one. Those procedures provide that "any party may file a complaint with the Commission" regarding compensation for coinless calls. *1996 Payphone Order* at 20,597 ¶ 112. FCC guidelines explain when those claims are ripe for agency adjudication, *id.* at 20,597-98 ¶¶ 112, 113; establish when the limitations period for compensation claims commences, *id.* at 20,598 ¶ 113; and provide a "timeliness" defense for carriers, *ibid.* Hence, there can be little doubt that this integrated system of enforcement mechanisms protects the integrity of the FCC's regulations; there is no need for a direct private cause of action.

3. Plaintiffs seeking to use sections 206 and 207 to bring a federal lawsuit for a violation of the Communications Act thus stand in the same position as they would if this Court had implied a cause of action to redress violations of the Act. When this Court implies a private cause of action, plaintiffs may bring suit to enforce the statute itself but not "regulations that go beyond what the statute itself requires." *Sandoval*, 532 U.S. at 293. Plaintiffs invoking sections 206 and 207 of the Communications Act likewise may bring lawsuits seeking damages for *statutory* violations. But sections 206 and 207 do not provide a vehicle for bringing complaints premised on violations of regulations. Absent explicit authorization elsewhere in the Act to enforce the regulations at issue, such complaints can and must be handled administratively. *See*

Conboy v. AT&T Corp., 241 F.3d 242, 252 (2d Cir. 2001) (holding that no private cause of action exists to enforce FCC regulations implementing section section 222 of the Telecommunications Act because "the text of the Telecommunications Act contains no language that explicitly provides a private right of action for damages for violations of the two FCC regulations at issue here").

Indeed, the prohibition here against bringing federal lawsuits based merely on violations of regulations is even clearer than it was in *Sandoval*. There, as in other implied right of action cases, Congress had not spoken at all in the statutory scheme at issue concerning the types of legal pronouncements that could give rise to private causes of action. So this Court was forced to estimate based on statutory clues how far Congress would have wanted the statute's implied private right of action to extend. *Sandoval*, 532 U.S. at 286; *see also Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 294 (1993) (in deciding whether private rights of action exist under the Securities Act, this Court has to "infer how the 1934 Congress would have addressed the issue"). Here, however, Congress has dictated that a private right of action exists to seek damages for violations of statutory provisions, but not for regulations. Those statutory directives must be honored.

B. Failing To Pay A Payphone Service Provider In Accordance With The FCC's Payphone Compensation Regulations Does Not Violate § 201(b).

While purporting at least at one point to accept the premise that private causes of action invoking sections 206 and 207 must assert a violation of a provision of "the *statute itself*," Pet. App. 7a, the Ninth Circuit held that Respondent could bring this suit seeking damages for alleged violations of the FCC's payphone compensation regulations because the FCC stated in its *2003 Payphone Order* that violations of its regulations also

violate section 201(b)'s statutory prohibition against "unjust and unreasonable" communications practices. Pet. App. 8a-21a (discussing *2003 Payphone Order*). But this reasoning does not withstand scrutiny. Nothing in the language of that statute itself requires long distance carriers to compensate payphone service providers for coinless calls, much less at the FCC's then-applicable rate of $0.24 per call. And nothing about the *2003 Payphone Order*'s suggestion to the contrary can create a private cause of action where it does not otherwise exist.

1. A Private Cause of Action to Enforce a Statute Extends Only to Violations of the Statute's Terms.

In determining whether an asserted cause of action is properly limited to asserting a "statutory" violation, this Court's precedent teaches that a private plaintiff's claim must rest on *express* statutory prohibitions. If a regulation prohibits something that the express terms of the statute do not, then a violation of that regulation is not a violation of the statute.

This Court's recent decision in *Sandoval* well illustrates this principle. There, Department of Justice regulations promulgated "to effectuate the provisions of [§] 601" of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, prohibited policies and practices that had a disparate impact on protected classes. *Sandoval*, 532 U.S. at 278. The plaintiff sought to enforce these regulations in federal court based on the statute's implied cause of action. This Court accepted the legitimacy of the regulations, *id.* at 281, but nevertheless held that they could not give rise to a private lawsuit. This Court explained that because § 601 itself "prohibits only intentional discrimination" – and not disparate impact discrimination – the plaintiff could not invoke the statute's private cause of action to remedy violations of that which the statute itself did not proscribe, *id.* at 280, 291.

Pre-*Sandoval* case law reinforces the requirement that a private cause of action based on a statutory violation must be grounded in a statutory prohibition itself. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 166-67 (1994), the plaintiff asserted a private cause of action for aiding and abetting a deceptive securities practice. This Court did not reject the SEC's conclusion that such liability would help effectuate the purposes of the statute. *Id.* at 189 (acknowledging that "policy arguments in favor of aiding and abetting liability can also be advanced"). But it held that such a cause of action did not exist because "the text of the [relevant] statute controls," and "the *text* of § 10(b) of the Securities Act does not prohibit aiding and abetting." *Id.* at 173, 191 (emphasis added). Other decisions are in accord. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-99 (1976) (rejecting SEC's reading of section 10(b) to include civil liability for negligent acts because the agency's interpretation "would add a gloss to the *operative language of the statute* quite different from its commonly accepted meaning") (emphasis added); *Mertens*, 508 U.S. at 254-55 (despite the availability at common law of cause of action for a nonfiduciary's knowing participation in breach of fiduciary duty, such a cause of action does not exist under ERISA because no such duty "explicitly" appears in statute's terms).

In sum, no matter how consistent a regulation may appear to be with the policy or directives of a statutory scheme, violating the regulation does not constitute a statutory violation unless the statute itself prohibits the alleged action.

2. Section 201(b) Does Not Address, Much Less Prohibit, the Conduct Alleged Here.

Section 201(b) declares that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign wire or radio] communication service, shall be just and reasonable" and that any such charge, practice,

classification, or regulation that is "unjust or unreasonable" is "unlawful." Nothing in this provision requires carriers to compensate payphone operators for coinless calls, much less according to the $0.24-per-call rate then specified in the FCC regulations. The FCC's regulations upon which Respondent's lawsuit is based thus plainly "go beyond what the statute itself requires." *Sandoval*, 532 U.S. at 293 n.8.

a. When interpreting the language of any given statute, this Court must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995); *see also John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (this Court is not guided by "a single sentence or member of a sentence, but looks to the provisions of the whole law, and to its object and policy") (quotation marks omitted). Accordingly, because section 201(b) says nothing, at least on its face, about payphone compensation, it is essential to begin the inquiry into the provision's purported application to that subject by understanding the two statutes in the Communication Act that actually speak directly to it: sections 226(e)(2) and 276. Those statutes demonstrate that Congress has never so much as hinted that a long distance carrier's failing to compensate a payphone service provider for coinless calls might be, in the words of section 201(b), "unjust or unreasonable."

In section 226(e)(2), enacted in 1990, Congress did not take any position on whether payphone service providers should be compensated *at all* for coinless calls. Instead, it simply directed the FCC to "consider the need to prescribe compensation" for payphone service providers for such calls. 47 U.S.C. § 226(e)(2). And after considering this issue, the FCC *declined* to require compensation for most coinless calls. *See Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation*, 6 F.C.C.R. 4736, 4745-46 ¶¶ 34, 36 (1991), *recon.*, 7 F.C.C.R. 3251, 3259 ¶ 50 (1992);

see also Illinois Pub. Telecomm., 117 F.3d at 559 (describing FCC's order and its consequences). So it is clear, at least as of the early 1990's, that no one, including the FCC, believed that any part of the Act required payphone service providers be compensated for coinless calls.

The Telecommunications Act of 1996 changed the law in that regard, but only slightly. It directed the FCC to establish a per call compensation plan to ensure that payphone service providers are compensated (save exceptions not relevant here) for "each and every" call completed from their payphones, including coinless calls. 47 U.S.C. § 276(b)(1)(A). But even though the Act now requires payphone operators to be compensated for coinless calls, it is silent concerning who should pay these fees or how much they should be. As even the Ninth Circuit acknowledged, section 276 "does not impose any obligations on *carriers*" to compensate payphone operators for coinless calls. Pet. App. 18a (emphasis added); *see also APCC Servs.*, 418 F.3d at 1246 ("Nothing in the statute requires the [FCC] to designate the IXC as the party responsible for payment."). The FCC's regulations would be perfectly valid if they required callers, instead of carriers, to compensate payphone service providers for coinless calls. *See Greene*, 340 F.3d at 1051. Thus, both times that Congress has focused on the specific issue of payphone compensation, it has declined to prescribe – or even to suggest – a particular method for insuring reimbursement of coinless calls.[4] Neither

[4] The most extensive discussion in the legislative history of the provision that became § 276 confirms that Congress had no opinion as to what kind of compensation plan was proper:

> In place of the existing regulatory structure, the Commission is directed to establish a new system whereby all payphone service providers – BOC and independent – are fairly compensated for every interstate and intrastate call made using their payphones, including, for example, "toll-free" calls to subscribers to 800 and new 888 services and calls dialed by means of carrier access codes. Carriers and customers that

payphone-specific statute makes any reference whatsoever to section 201(b).

Even the FCC itself, in responding to section 276, has been somewhat agnostic concerning who should compensate payphone service providers for coinless calls and how much they should pay. As an initial matter, the FCC has acknowledged that people who place coinless payphone calls are the actual "cost causers." *1996 Payphone Order* at 20,585 ¶ 85. It, therefore, was not any equitable impulse that pushed the FCC to adopt a "carrier pays" system. Rather, the FCC adopted this system simply "in order to maintain the convenience of coinless calling upon which the public has come to rely." *Illinois Pub. Telecomm.*, 117 F.3d at 567.[5] The carrier pays system, in fact, explicitly contemplates that long distance carriers that are required to pay payphone service providers for calls will "recover their own costs" by billing or contracting in advance with the callers. *1996 Payphone Order* at 20,584 ¶ 83. It thus is hard to say, at least based on these

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> benefit from the availability of a payphone should pay for the service they receive when a payphone is used to place a call. In crafting implementing rules, the Commission is not bound to adhere to existing mechanisms or procedures established for general regulatory purposes in other provisions of the Communications Act of 1934.

H.R. Rep. No. 104-204(I), at 88 (1995).

[5] Even within the "carrier pays" system, the FCC "has reversed positions several times on the issue of *which* carrier should pay the PSP when more than one carrier handles a call." Pet. App. 12a (emphasis in original). Sometimes numerous carriers handle the same coinless payphone call. A local exchange carrier ("LEC") serving the payphone transmits the call to an interexchange carrier's ("IXC") switching facilities. *See, e.g., In re APCC Services, Inc.*, 20 F.C.C.R. 2073, 2075 (2005). The IXC, in turn, may then transmit the call to the LEC serving the call recipient or it may instead transmit the call to a "reseller." *Id.* The call may be transmitted to one or more additional resellers before landing at the LEC serving the call recipient. *Id.* at 2075-76; *see also* Pet. App. 12a.

realities, that there is anything "unjust or unreasonable" about a particular carrier not compensating a payphone service provider for coinless calls. Such inaction is, at most, an administrative breakdown.

Indeed, had the FCC used its discretion under section 276 to assign this payment obligation directly to *callers* instead of carriers, there would be no dispute whatsoever that failures to pay could not give rise to any private cause of action. Sections 206 and 207 pertain only to violations committed by "common carrier[s]." They do not allow aggrieved parties to sue any other persons or entities. Surely if Congress had wished payphone service providers to have a private cause of action to collect compensation for coinless calls, it would not have let this right depend on the possibility that the FCC would ultimately designate long distance carriers instead of anyone else as responsible for such compensation.

The same is true with respect to rates. The FCC has acknowledged that there are several viable methods for setting compensation rates for payphone calls. Rates can be based on market rates, the payphone service provider's costs, or other measures. *See, e.g., Illinois Pub. Telecomm.*, 117 F.3d at 559-60 (discussing various approaches). Indeed, over time, the FCC has established the per call rate at prices ranging from $0.35 to $0.284 to $0.24 (the rate at the time of this case). *Ibid.* The D.C. Circuit also has acknowledged that even though the $0.24-per-call rate applicable here was within the generous bounds of agency discretion, the data underlying the rate "could be subjected to various challenges" on the ground that it still pushes rates too high. *American Pub. Commc'n Council*, 215 F.3d at 58. Add to this situation the fact that the FCC regulations also expressly invite long distance carriers and payphone service providers to contract between themselves at any different per call rate they may wish, *see* 47 C.F.R. § 64.1300(c), and it becomes clear that the $0.24 per call rate Respondent seeks to enforce here is hardly necessary to

maintain a just and reasonable system of telecommunications in the United States. However constructive FCC's regulations may be, they cannot be attributed to Congress.

b. Because the statutes that specifically discuss payphone compensation have never suggested a right or wrong way of compensating payphone service providers, it follows that section 201(b) – a statute enacted in 1934 as part of the original Act that does not even mention payphone compensation – cannot be read indirectly to impose requirements that Congress explicitly declined to impose directly. It is a cardinal rule of statutory construction that "a statute dealing with a narrow, precise, and specific subject [cannot be] submerged by a . . . statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *see also Green v. Bock Laundry Machine Co.*, 480 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). Therefore, because neither section 226(e)(2) nor section 276 requires long distance carriers to compensate payphone service providers for coinless calls, section 201(b)'s generalized prohibition against "unjust and unreasonable" practices cannot be read as doing so either.

The Ninth Circuit tried to play down this problem by asserting that section 276 "cannot be considered more specific" than section 201(b) because section 276 does not "impose any obligations on carriers" to compensate payphone service providers for coinless calls or "relieve them of any [such] obligations." Pet. App. 18a. But this analysis simply begs the question. The very issue here is whether the Act imposes any such obligation on carriers. And the provision in the Act that even the Ninth Circuit acknowledges "more specifically addresses the subject of payphone regulation" does not impose any such obligation. *Ibid.* Ergo, no other provision may do so. One cannot simply *assume* that the more general provision imposes such an obligation and then pronounce that, therefore, it actually is the more specific provision of the two.

The FCC's reports and orders that generated and have continually refined the payphone compensation regulations underscore that section 201(b) cannot seriously be said to compel long distance carriers to compensate payphone service providers for coinless calls according to the terms of those regulations. In the first paragraph of the first report and order on the subject, the FCC pronounced that it was adopting regulations "to implement Section 276." *1996 Payphone Order* at 20,543 ¶ 1. Subsequent reports and orders consistently describe that section as the foundation for the FCC's authority. *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order*, 13 F.C.C.R. 1778, 1779 ¶ 1 (1997) (order "based on our analysis of the record and the statutory policy goals of Section 276"); *Third Report and Order*, 14 F.C.C.R. 2545, 2547 ¶ 1 (1999) ("In this proceeding, we continue our efforts to implement the requirements of section 276.") (hereinafter "*1999 Payphone Order*"); *Third Order on Reconsideration and Order on Clarification*, 16 F.C.C.R. 20,922, 20,923 ¶ 4 (2001) ("to implement Section 276"); *Fourth Order on Reconsideration and Order on Remand*, 17 F.C.C.R. 2020, 2020-21 ¶ 2 (2002) (this and related orders "implement section 276"); *Fifth Order on Reconsideration and Remand*, 17 F.C.C.R. 21,274, 21,275 ¶ 2 (2002) ("The foundation of our authority to regulate per-call and per-phone compensation is section 276 of the Act"); *2003 Payphone Order* at 19,976 ¶ 2 ("adopt[ing] these rules to ensure that" payphone service providers are compensated "under section 276"). None of these reports and orders suggests that it is intended to interpret or implement section 201(b)'s prohibition against "unjust and unreasonable" communications practices.

This, of course, is no surprise. Section 201(b) was on the books for sixty-two years before section 276 was enacted, and no entity or party ever suggested during all those years that it spoke in any way to payphone compensation. Yet as soon as

Congress enacted section 276 – asking the FCC to develop a compensation system but not suggesting that any particular kind of system was necessary – the FCC sprung into action. The FCC's regulations implement section 276; they do not interpret section 201(b).

Straining to find any evidence that the FCC's reports and orders concerning payphone compensation have some connection to section 201(b), the Ninth Circuit noted that the FCC has "cited § 201, in addition to § 276 and other sections, as authority" for the enactment of the payphone regulations. Pet. App. 9a. But the paragraph the Ninth Circuit referenced is nothing more than the boilerplate recitation of all sections of the Communications Act that create the FCC and grant it general authority to enact regulations. *See 1999 Payphone Order* at 2648 ¶ 232 ("Accordingly, pursuant to authority contained in Sections 1, 4, 201-205, 226, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 219, 220, 226, and 276, IT IS ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED."). The payphone regulations no more interpret or implement a particular part of a particular subsection of section 201(b) than any part of any of the other subsections of the eleven sections in this laundry list, most of which unquestionably are irrelevant to the exercise of the FCC's rulemaking authority here. *See* 47 U.S.C. § 202 (discriminatory practices); § 203 (filing tariffs); § 204 (hearings on carrier rates); § 205 (prescription of carrier rates); § 215 (access to books and records); § 218 (inquiries into carrier management practices); § 219 (reports by carriers); § 220 (accounting methods, depreciation).

3. The FCC's Reference to § 201(b) in the *2003 Payphone Order* Does Not Alter This Analysis.

Instead of concluding, as it should have, that section 201(b)'s silence with respect to payphone compensation required

dismissal of Respondent's complaint, the Ninth Circuit found a private cause of action to exist because the FCC stated in its *2003 Payphone Order* that payphone service providers could bring lawsuits in federal court, in part based on section 201(b), to recover for violations of the FCC's payphone regulations. Pet. App. 14a-21a. The relevant passage of the order reads in full:

> To the extent APCC's argument [that certain particular carriers should compensate payphone service providers for coinless calls when multiple carriers handle a call] is based on ease of collecting owed debts, the D.C. Circuit, in upholding the reasonableness of the Commission's decision in *APCC v. FCC* [, 215 F.3d 51, 56 (D.C. Cir. 2000),] found that the [payphone service providers] had remedies to collect this debt from delinquent carriers. A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.

2003 Payphone Order at 19,990 ¶ 32.

Although the FCC's reference to section 276 flatly contradicts the Ninth Circuit's earlier decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003), that section 276 does *not* give rise to a private cause of action – a decision that Respondent does not challenge – the Ninth Circuit reasoned that the FCC's statement is an authoritative interpretation of *section 201(b)*. And the Ninth Circuit held that the FCC's supposed interpretation gives rise to a private cause of action because a Congress that, as here, "'intends the statute to be enforced through a private cause of action intends the *authoritative interpretation of the statute* to be so enforced

as well.'" Pet. App. 21a n.8 (quoting *Sandoval*, 532 U.S. at 284) (emphasis added by Ninth Circuit). This analysis, however, grants undue deference to the FCC's statement and thus misapplies the quoted passage from *Sandoval*.

a. The FCC's statement is not a type that is eligible for any kind of deference.

There are two independent reasons why the FCC's statement is not eligible for any kind of deference: (i) it concerns the scope of the Act's private cause of action, not substantive statutory terms; and (ii) it is not explained by sufficient – indeed, any – reasoning.

i. The FCC's statement is centrally concerned with providing a remedy for violations of the payphone compensation regulations, *2003 Payphone Order* at 19,990 ¶ 32, not substantive provisions of the Communications Act. Only five weeks before the FCC issued its statement, the Ninth Circuit had held in *Greene* that section 276 did *not* give rise to a private cause of action for violations of the FCC's payphone compensation regulations and used broad language suggesting that no other provision of the Act did either. *See* Pet. App. 6a-8a; *Greene*, 340 F.3d at 1050-52. The FCC's statement implicitly responded to that opinion, asserting for the first time – and without any prior notice – that the regulations could in fact support damages suits in federal court. The Ninth Circuit itself thus understood that the true significance of the FCC's statement is the assertion of an "availability of actions for damages under §§ 206 and 207." Pet. App. 13a.

Although the Ninth Circuit appreciated the aim of the FCC's statement, it overlooked that neither *Chevron* nor any other kind of deference applies when an agency opines respecting the presence of federal judicial power to provide remedies for violations of federal law. "[T]he authority to construe a statute is fundamentally different from the authority to fashion a new

rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines*, 451 U.S. at 97. When an agency construes a substantive statute within its purview, its views are entitled to deference because the agency is an "expert" in the area. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 48 (1983) (quotation marks omitted); *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 652 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."). But the federal courts, not agencies, are the experts when it comes to explicating the reach of statutes that create private causes of action.

This Court's decision in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), illustrates the point. There, a federal statute provided a private cause of action for violations of the Seasonal Agricultural Worker Protection Act. The Department of Labor enacted a regulation purporting to refine the circumstances under which that right could be invoked when state remedies also were available. Even assuming that there was ambiguity as to whether a private cause of action existed under those circumstances, this Court squarely held that it "need not defer" to an agency's view when the agency purports to "regulate the scope of judicial power vested by the statute." *Id.* at 649-50. This Court explained that when

> Congress establish[es] an enforcement scheme . . . and provide[s] aggrieved [individuals] with direct recourse to federal court where their rights under the statute are violated . . . , it would be inappropriate to consult executive interpretations of [the statute] to resolve ambiguities surrounding the scope of [the statute's] judicially enforceable remedy.

Id. at 650. Basic separation of powers principles dictate that courts have the sole authority to decide when a private cause of action is available.

The Ninth Circuit's decision to defer to the FCC's statement in the *2003 Payphone Order* contravenes this rule. The FCC's statement does not truly interpret the statute's substance, as *Sandoval* contemplated when it said that authoritative interpretations of a statute "are covered by a cause of action to enforce that section." 532 U.S. at 284. Rather, the FCC's statement is an attempt to manufacture a cause of action that does not otherwise exist. The statement itself explains that it concerns the "remedies" payphone service providers have to "collect[] owed debts" from delinquent carriers. *2003 Payphone Order* at 19,990 ¶ 32. And the statement asserts – contrary to Congress's requirement in sections 206 and 207 that private lawsuits be based on *statutory* violations – that violations of the FCC's regulations can support a private action for damages in federal court. Just like the agency in *Adams Fruit*, the FCC lacks the authority to "regulate the scope of the judicial power vested by the [private cause of action] statute." *Adams Fruit*, 494 U.S. at 650. And just like the agency in *Northwest Airlines*, the FCC may not "provide a new remedy which Congress has decided not to adopt." 451 U.S. at 97.[6]

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[6] Even if the FCC's construction of the Act's private cause of action provisions were eligible for deference, none would be warranted here. The sole reason the FCC advanced for asserting that payphone service providers should be able to bring lawsuits to seek damages based on violations of the FCC's payphone compensation regulations was that the D.C. Circuit supposedly had suggested that such lawsuits would be proper. *See 2003 Payphone Order* at 19,990 ¶ 32 (relying on *APCC v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000)). The D.C. Circuit, however, has since repudiated this interpretation of its precedent, holding squarely that such lawsuits may *not* be brought. *See APCC Servs.*, 418 F.3d at 1247-48. Agency action that is based on an erroneous view of the law cannot be sustained. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (rejecting agency conclusion

ii. Even if the FCC's statement in the *2003 Payphone Order* could properly be read as expressing a substantive interpretation of section 201(b) instead of opining respecting the availability of federal court remedies, the statement was not the product of sufficient deliberation or explanation to warrant any deference. The concept of *Chevron* deference presupposes that an agency engage in a deliberative process. Accordingly, this Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48. It is "require[d] that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see also S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. ___, ___ (2006) (slip op. at 6) (agency's definition of statutory term did "not command deference from this Court" because expressions of that understanding did not "set out agency reasoning"); *State Farm*, 463 U.S. at 43 ("agency must . . . articulate a satisfactory explanation for its action"). Such disclosures assure this Court and the public that agency pronouncements are the product of reflection instead of whim or caprice.

Here, the FCC has not offered any evidence whatsoever that it suitably deliberated on the topic of whether failing to abide by its payphone compensation regulations constitutes an unjust or unreasonable practice under section 201(b). The FCC's Notice of Proposed Rulemaking that presaged the *2003 Payphone Order* made no mention of section 201(b), much less provided any hint that the FCC was considering making a finding that a violation of its payphone compensation regulations would implicate that provision. *See Payphone Docket*, Further Notice of Proposed Rulemaking, 18 F.C.C.R. 11,003 (2003). It therefore comes as no surprise that the FCC did not receive any briefing or comments on the issue.

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because "the cases upon which [the agency relies] do not establish principles of law" for which the agency cited them).

Nor did the FCC provide any reasoning at all as to why violations of the specific regulations at issue here supposedly constitute unjust and unreasonable practices. The FCC's statement simply pronounces that violations of any of the hundreds of its rules respecting payphone compensation constitute an unjust and unreasonable practice. *2003 Payphone Order* at 19,990 ¶ 32. This passage provides no reason whatsoever why a practice, such as the one here, that Congress has never prohibited and that the FCC itself declined in 1990 to prohibit, *see supra* at 23, suddenly would constitute an "unjust or unreasonable" practice under the longstanding language of section 201(b). To say the least, some explanation for such a dramatic reversal of policy should be required before creating a new kind of liability in federal court. Because "[t]here are no findings and no analysis here to justify the choice made [and] no indication of the basis on which the [agency] exercised its expert discretion," *State Farm*, 463 U.S. at 48 (quotation marks omitted), the Ninth Circuit erred in deferring to the FCC's statement.[7]

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[7] The Ninth Circuit at one point attempted to fill this void by looking to the *amicus* brief that the FCC submitted to it, in which the agency attempted to provide an after-the-fact rationale for its supposed interpretation of section 201(b). Pet. App. 20a; *see* Brief of FCC as Amicus Curiae, *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056 (9th Cir. 2005) (No. 04-35287), *available at* 2004 WL 2297782. The FCC's *amicus* brief, however, was too little, too late because "the considerations urged [therein] in support of the Commission's order were not those upon which its action was based." *Chenery*, 318 U.S. at 92. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself" – not "appellate counsel's *post hoc* rationalizations for agency action." *State Farm*, 463 U.S. at 50. *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (refusing to defer to agency position "urged only in the context of this litigation"); *Chenery*, 318 U.S. at 94 (agency action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act").

b. Even if the FCC's statement were eligible for deference, none would be warranted here.

Even if the FCC's statement that failures to pay in accordance with its payphone compensation regulations can give rise to federal damages suits were eligible for deference, none would be warranted here. "The weight [accorded to an administrative declaration] . . . depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). And "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecom. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994). The FCC's statement here is not entitled to deference for three specific reasons: (i) it stretches the meaning of section 201(b)'s "unjust or unreasonable" phrase too far, by applying it to conduct that cannot plausibly be characterized as either; (ii) it stretches the language of section 201(b)'s term "practice" too far, by suggesting it applies to *intra*state communications service and to business arrangements between communications carriers; (iii) it would turn section 201(b) into a catchall provision, enabling the FCC, contrary to congressional will, to declare that virtually all of its regulations give rise to private causes of action.

i. As explained *supra* at 22-29, there is nothing "unjust or unreasonable" about a long distance carrier declining to compensate a payphone service provider for a coinless call. As the FCC itself has recognized, *callers*, not carriers, are the "cost causer[s]" when they place coinless calls from payphones. *1996 Payphone Order* at 20,585 ¶ 85. It is *callers* who are maneuvering to avoid putting money into payphones. And it is *callers* who ought to be paying payphone service providers for the use of their payphones. The FCC regulations put long distance carriers on the hook for these payments only

to effectuate consumer convenience. *Id.*; *Illinois Pub. Telecomm.*, 117 F.3d at 567. That being so, a carrier's failure to pay a payphone service provider to compensate for the actions of callers is hardly unjust or unreasonable.

The Ninth Circuit brushed aside this predicament, reasoning that additional statutory language in section 201(b) "gives the Commission broad power to enact such 'rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' *including* sections that were later added by the Telecommunications Act of 1996." Pet. App. 15a (quoting section 201(b)) (emphasis added by Ninth Circuit). In the Ninth Circuit's view, therefore, even though the Act itself in section 201(b)'s "unjust and unreasonable" language does not deem unlawful the conduct Respondent alleges here, the FCC's broader "rulemaking authority" permits the agency to declare it so. Pet. App. 16a. But this method of attempting to ground the FCC's regulations in statutory pronouncements runs headlong into *Sandoval*. In *Sandoval*, this Court made clear that regulations based merely on a directive to carry out the provisions of a statute instead of any rights-creating language in the statute itself are not statutorily based so as to give rise to a private cause of action. 532 U.S. at 285-89.

That is precisely the case here. While the rulemaking directives in sections 201(b) and 276 give the FCC the power to issue regulations that require long distance carriers to compensate payphone service providers at a certain rate for coinless calls, the "unjust or unreasonable" language in section 201(b) does not require such compensation. Accordingly, the Ninth Circuit was simply wrong in holding that the FCC's broad rulemaking authority renders reasonable the agency's assertion that any violation of its payphone compensation regulations is "unjust or unreasonable."

ii. Even if a long distance carrier's failure to compensate a payphone service provider for a coinless call at $0.24 per call

were somehow "unjust or unreasonable," such failure would not be a communications "practice" covered by section 201(b). The only "practices" covered by section 201(b) are those "in connection with . . . [a] communications service" described in section 201(a). Section 201(a), in turn, requires common carriers engaged in "interstate or foreign communication by wire or radio to furnish such communication service upon a reasonable request therefor." This language contains two independent limitations that exclude the conduct Respondent alleges here from its reach.

First, section 201(b) applies only to "interstate or foreign" communications services. Yet section 276 and the FCC's payphone compensation regulations apply to "*intra*state and interstate call[s]." 47 U.S.C. § 276(b)(1)(A) (emphasis added); *see also 1996 Payphone Order* at 20,543 ¶ 1 (FCC rules apply to "every completed intrastate and interstate call using a payphone") (quotation marks omitted). Therefore, violating those regulations with respect to compensation for *intra*state calls cannot possibly violate section 201(b); any action relating to such calls is beyond that provision's reach. This jurisdictional disconnect between section 276 and section 201(b) does not merely mean that only some violations of the FCC's regulations (those with respect to interstate calls) violate section 201(b). Rather, it demonstrates that section 201(b) simply does not apply to payphone compensation, for it would not make any sense to legislate that failures to compensate payphone service providers for coinless interstate calls is unjust and unreasonable but failures to compensate them for such *intra*state calls is not.

Second, the text of the Act's common carrier provisions make clear that section 201(b) regulates carriers' relationships only with customers who request communications service; it does not regulate carriers' relationships with other carriers. *See National Cable & Telecommunications Ass'n v. Brand X*, 125 S. Ct. 2688, 2696 (2005) ("Telecommunications carriers . . .

must charge just and reasonable, nondiscriminatory rates to their *customers*, 47 U.S.C. §§ 201-209.") (emphasis added); *Boomer v. AT&T Corp.*, 309 F.3d 404, 418 (7th Cir. 2002) ("Sections 201 and 202, read together, demonstrate a congressional intent that individual long-distance *customers* throughout the United States receive uniform rates, terms and conditions of service.") (emphasis added); 2 HARVEY L. ZUCKERMAN ET AL., MODERN COMMUNICATIONS LAW § 12.1.C.2 (1999) ("Section 201 . . . establishes the duty of common carriers to furnish service upon reasonable request and to establish reasonable charges, practices, classifications and regulations *regarding service*.") (emphasis added). This limitation is inherent in section 201's reference to "request[s]" to "furnish communications service," as well as neighboring provisions' use of the term "practices" explicitly to refer to things "affecting . . . charges" for service and rate schedules. 47 U.S.C. § 203; *see also id.* §§ 202, 204-05.

Lest the plain text of the Act leave any doubt that section 201(b) applies only to the rates and services carriers provide to customers, "reasonable inferences from [the statute] give a clear answer," *Brown v. Gardner*, 513 U.S. 115, 120 (1994), that Congress did not intend section 201(b) to apply beyond that realm. Because "a word 'gathers meaning from the words around it,'" *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 702 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)), "a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning.'" *S.D. Warren Co.*, 547 U.S. at ____ (slip op. at 7) (quoting *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990)); *see also Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Here, the term "practice" in section 201(b) is grouped with the transactional terms "charge," "classification," and "regulation." It would be "quite a leap," as the D.C. Circuit previously has recognized, to move from that context of

transactional terms "to an implication that by the word 'practice,' Congress empowered the Commission not merely to effect a reformation of some 'practice' in a more traditional sense of actions habitually being taken" with respect to rates and services, but to reach virtually any action a carrier takes in the course of its business, on the ground that all actions are indirectly related to rates and services. *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004).

The Ninth Circuit's only response to this point was its assertion that section 201(b) is "*not clearly unrelated* to a carrier's rates and services" because "Congress and the Commission have recognized [that payphone service providers] must be compensated if customers are to be able to use the dial-around long distance service that the carrier provides." Pet. App. 17a (emphasis added). But agency determinations may be upheld only upon reasoning advanced by the agency itself, *see, e.g.*, *Chenery*, 318 U.S. at 88, and *the FCC* did not make this argument when referencing section 201(b) in the *2003 Payphone Order*. And no wonder, for it conflicts with the plain text of the statute. Section 201(b) requires regulated practices to be "connect[ed]" with carrier-customer dealings, not "not clearly unrelated" to them.

In any event, the Ninth Circuit's assertion concerning what Congress – the only entity that matters when assessing whether an agency interpretation comports with a statute – supposedly has recognized is demonstrably untrue. In 1990, Congress was expressly agnostic as to whether payphone service providers should be compensated for such calls. *See supra* at 22-23. In 1996, Congress directed the FCC to ensure that payphone service providers are compensated, but not so that customers would be "able to use the dial-around long distance service that the carrier provides." Pet. App. 17a. Indeed, the several years prior to 1996 proved that customers would be able to make coinless calls regardless of whether payphone service providers were compensated. Congress simply decided in 1996 that it

wanted to spur increased competition in this market and to promote even more widespread deployment of payphone services. 47 U.S.C. § 276(b)(1).

The Communications Act's lineage reinforces the requirement that practices relate meaningfully to the services provided and rates charged to customers to be covered by section 201. The Act was derived from the Interstate Commerce Act. *See* Pet. App. 16a n.7 (citing S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934) (detailing ICA provisions from which Congress drew each section of Communications Act)); *Conboy*, 241 F.3d at 250 ("[D]ecisions construing the ICA are persuasive in establishing the meaning of the Communications Act."). And this Court already has held that covered "practices" under the Interstate Commerce Act are limited to those connected "with the fixing of rates to be charged and prescribing of service to be rendered." *Missouri Pacific R.R. Co. v. Norwood*, 283 U.S. 249, 257 (1931). The same rule pertains here and forecloses the FCC's suggestion to the contrary.

iii. In the end, the FCC's expansive conception of section 201(b) runs right back into the plain language of sections 206 and 207. If the FCC were right in suggesting that a long distance carrier's violation of the payphone compensation regulations constituted an unjust or unreasonable communications practice, then violating virtually any regulation respecting common carriers would violate section 201(b). And as the D.C. Circuit has explained, "the notion that it is an inherently unreasonable practice, within the meaning of section 201(b), to violate a Commission regulation . . . [would] convert[] any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court." *APCC Servs.*, 418 F.3d at 1247. Yet if there is one thing that the Act makes clear, it is that Congress drafted the private cause of action provisions to *preclude* violations

merely of regulations from giving rise to lawsuits in federal courts. *See supra* at 11-18.

Not only would deferring to the FCC's view here flout this congressional intent, it would open the door to untold mischief, because such a drastic expansion of the Communications Act's private cause of action provisions "would place th[e] interpretive function [of the Act] squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission." *New England Tel. & Tel. Co. v. Public Utilities Comm. of Maine*, 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.). This would "threaten[] the sound development of a coherent nationwide communications policy – a central objective of the Act." *Id.* at 5; *accord Conboy*, 241 F.3d at 253. Congress could not possibly have intended the FCC to wield section 201(b) in a way that would erase the industry uniformity it was attempting to create through the passage of the Communications Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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47 C.F.R. § 64.1300 Payphone compensation obligation.

(a) Except as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract.

(b) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.

(c) In the absence of an agreement as required by paragraph (a) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of $.24.

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47 C.F.R. § 64.1301 Per-payphone compensation.

(a) *Interim access code and subscriber 800 calls.* In the absence of a negotiated agreement to pay a different amount, each entity listed in Appendix A of the *Fifth Order on Reconsideration and Order on Remand* in CC Docket No. 96-128, FCC 02-292, must pay default compensation to payphone service providers for payphone access code calls and payphone subscriber 800 calls for the period beginning November 7, 1996, and ending October 6, 1997, in the amount listed in Appendix A per payphone per month. A complete copy of Appendix A is available at www.fcc.gov.

(b) *Interim payphone compensation for inmate calls.* In the absence of a negotiated agreement to pay a different amount, if a payphone service provider providing inmate service was not compensated for calls originating at an inmate telephone during the period starting on November 7, 1996, and ending on October 6, 1997, an interexchange carrier to which the inmate telephone was presubscribed during this same time period must compensate the payphone service provider providing inmate service at the default rate of $0.238 per inmate call originating during the same time period, except that a payphone service provider that is affiliated with a local exchange carrier is not eligible to receive payphone compensation prior to April 16, 1997, or, in the alternative, the first day following both the termination of subsidies and payphone reclassification and transfer, whichever date is latest.

(c) *Interim compensation for 0+ payphone calls.* In the absence of a negotiated agreement to pay a different amount, if a payphone service provider was not compensated for 0+ calls originating during the period starting on November 7, 1996, and ending on October 6, 1997, an interexchange carrier to which the payphone was presubscribed during this same time period must compensate the payphone service provider in the default amount of $4.2747 per payphone per month during the same time period, except that a payphone service provider that is affiliated with a local exchange carrier is not eligible to receive payphone compensation prior to April 16, 1997, or, in the alternative, the first day following both the termination of subsidies and payphone reclassification and transfer, whichever date is latest.

(d) *Intermediate access code and subscriber 800 calls.* In the absence of a negotiated agreement to pay a different

amount, each entity listed in Appendix B of the *Fifth Order on Reconsideration and Order on Remand* in CC Docket No. 96-128, FCC 02-292, must pay default compensation to payphone service providers for access code calls and payphone subscriber 800 calls for the period beginning October 7, 1997, and ending April 20, 1999, in the amount listed in Appendix B for any payphone for any month during which per-call compensation for that payphone for that month was not paid by the listed entity. A complete copy of Appendix B is available at www.fcc.gov.

(e) *Post-intermediate access code and subscriber 800 calls.* In the absence of a negotiated agreement to pay a different amount, each entity listed in Appendix C of the *Fifth Order on Reconsideration and Order on Remand* in CC Docket No. 96-128, FCC 02-292, must pay default compensation to payphone service providers for access code calls and payphone subscriber 800 calls for the period beginning April 21, 1999, in the amount listed in Appendix C for any payphone for any month during which per-call compensation for that payphone for that month was or is not paid by the listed entity. A complete copy of Appendix C is available at www.fcc.gov.

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47 C.F.R. § 64.1310 Payphone compensation payment procedures.

(a) It is the responsibility of the first facilities-based interexchange carrier to which a compensable coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier to track, or arrange for the tracking of, each such call so that it may accurately compute the compensation required by Sec. 64.1300(a). The first facilities-based interexchange carrier to which a

compensable coinless payphone call is delivered by the local exchange carrier must also send back to each payphone service provider at the time dial around compensation is due to be paid a statement in computer readable format indicating the toll-free and access code numbers that the LEC has delivered to the carrier, and the volume of calls for each toll-free and access number each carrier has received from each of that payphone service provider's payphones, unless the payphone service provider agrees to other arrangements.

(b) The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier may obtain reimbursement from its reseller and debit card customers for the compensation amounts paid to payphone service providers for calls carried on their account and for the cost of tracking compensable calls. Facilities-based carriers and resellers may establish or continue any other arrangements that they have with payphone service providers for the billing and collection of compensation for calls subject to Sec. 64.1300(a), if the involved payphone service providers so agree.

(c) Local Exchange Carriers must provide to carriers required to pay compensation pursuant to Section 64.1300(a) a list of payphone numbers in their service areas. The list must be provided on a quarterly basis. Local Exchange Carriers must verify disputed numbers in a timely manner, and must maintain verification data for 18 months after close of the compensation period.

(d) Local Exchange Carriers must respond to all carrier requests for payphone number verification in

connection with the compensation requirements herein, even if such verification is a negative response.

(e) A payphone service provider that seeks compensation for payphones that are not included on the Local Exchange Carrier's list satisfies its obligation to provide alternative reasonable verification to a payor carrier if it provides to that carrier:

(1) A notarized affidavit attesting that each of the payphones for which the payphone service provider seeks compensation is a payphone that was in working order as of the last day of the compensation period; and

(2) Corroborating evidence that each such payphone is owned by the payphone service provider seeking compensation and was in working order on the last day of the compensation period. Corroborating evidence shall include, at a minimum, the telephone bill for the last month of the billing quarter indicating use of a line screening service.

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47 C.F.R. § 64.1320 Payphone compensation verification and reports.

(a) Carriers subject to payment of compensation pursuant to Section 64.1300(a) shall conduct an annual verification of calls routed to them that are subject to such compensation and file a report with the Chief, Common Carrier Bureau within 90 days of the end of the calendar year, provided, however, that such verification and report shall not be required for calls received after December 31, 1998.

(b) The annual verification required in this section shall list the total amount of compensation paid to payphone service providers for intrastate, interstate and international calls, the number of compensable calls received by the carrier and the number of payees.

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GLOBAL CROSSING TELECOMMUNICATIONS, INC.,

Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether 47 U.S.C. §§ 206-207 create a private right of action for a provider of payphone services to sue a long-distance carrier for violations of the FCC's regulations concerning compensation for coinless phone calls.

RULE 29.6 STATEMENT

The corporate disclosure statement in respondent's brief in opposition remains accurate.

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STATEMENT

Petitioner Global Crossing is a long-distance or inter-exchange carrier (IXC), which is a type of common carrier. Respondent Metrophones is a payphone service provider (PSP). Metrophones sued Global Crossing in federal court for failure to pay compensation for completed payphone calls.

Under 47 U.S.C. §§ 206-207, every act by a common carrier that is in the Communications Act "declared to be unlawful" gives rise to an *express* private right of action for damages. Under 47 U.S.C. § 201(b), every "unjust or unreasonable" "practice" in connection with a communication service "is declared to be unlawful." Under 47 U.S.C. § 276(b)(1)(A)'s command to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones," the Federal Communications Commission (FCC) has lawfully imposed on common carriers, by regulation, the obligation to pay PSPs for the "dial-around" calls at issue in this case.

To reverse the Ninth Circuit and hold that Metrophones may not sue Global Crossing in federal court for unpaid dial-around compensation, this Court would have to conclude that it is either just and reasonable, or not a "practice," for a common carrier to flout Congress's fair-compensation command by violating the FCC's regulations that carry out that command. The Court would have to reach that conclusion, moreover, in the face of repeated statements to the contrary by the agency to which Congress has delegated authority to interpret the Act.

A. The Regulatory Framework Created By Congress

Before 1990, PSPs frequently sent all long-distance calls from their payphones to a single IXC, pursuant to exclusive contractual arrangements under which the IXC would bill the caller (or the called party) and remit compensation to the PSP for the use of its payphone. Congress ended such exclusive arrangements in 1990. It enacted legislation – the Telephone Operator Consumer Services Improvement Act of 1990

(TOCSIA), codified at 47 U.S.C. § 226 – that required PSPs to permit callers to use the services of *any* IXC, not just the IXC who had contracted with the PSP. See 47 U.S.C. § 226(c)(1)(B).

1. "Dial-around" calls (so named because a caller can "dial around" the IXC that has a contractual arrangement with the PSP, *e.g.*, by placing an "800" call to reach another IXC's network) enabled companies like Global Crossing to generate millions of dollars in revenue by providing calling-card and toll-free calling services that could be used from any payphone, but left PSPs largely uncompensated. See Pet. App. 3a-4a (describing industry history). Dial-around calls constituted a substantial portion of payphone usage when these cases were filed (JA 7), and the absence of compensation for such calls severely reduced PSPs' incentives to deploy and maintain payphones, threatening the public's access to a critical service.

In TOCSIA, Congress directed the FCC to "*consider* the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones" for certain dial-around calls. 47 U.S.C. § 226(e)(2) (emphasis added). The FCC ordered compensation for all calls it understood to be covered by the statute. See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 F.C.C.R. 4736 (1991) (First Report and Order); *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, 7 F.C.C.R. 3251 (1992) (Second Report and Order).[1] The FCC stated that it was acting under the authority of Section 201, which requires that "charges, practices, classifications, and

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[1] The statement at Pet. Br. 22 that "the FCC *declined* to require compensation for most coinless calls" is untrue. The FCC took the position (which the D.C. Circuit later reversed) that subscriber 800 calls were not covered by the statute, but ordered compensation for all calls it believed were covered.

regulations for and in connection with" a common carrier's services must be "just and reasonable." See, *e.g.*, First Report and Order ¶ 59; Second Report and Order ¶ 66.

2. In practice, the TOCSIA regime did not ensure adequate compensation for PSPs. Not only had Congress merely directed the FCC to "consider" the problem, but also the FCC took the position that subscriber 800 calls were not covered by the statute at all. The D.C. Circuit remanded that issue for further consideration in *Florida Public Telecomm'ns Ass'n* v. *FCC*, 54 F.3d 857 (1995), and the matter was still pending on remand when Congress passed new legislation.

In 1996, Congress took forceful measures. No longer would it be enough for the FCC to "consider" the problem of dial-around compensation, and no longer would Congress leave any room for dispute about which dial-around calls were to be compensated. Rather, to "promote the widespread deployment of payphone services to the public," Congress directed the FCC to "take *all actions necessary* * * * to prescribe regulations that establish a per call compensation plan to *ensure* that all payphone service providers are fairly compensated for *each and every completed intrastate and interstate call* using their payphones." 47 U.S.C. § 276(b)(1)(A) (emphasis added).

The FCC developed such a plan and has modified it from time to time through a series of notice-and-comment rulemakings. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 F.C.C.R. 19,975, 19,977-19,983 ¶¶ 5-17 (2003) (*2003 Payphone Order*) (describing regulatory history). The FCC's compensation plans generally have required an IXC to pay compensation when it is the primary economic beneficiary of a call. See, *e.g.*, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20,541, 21,277 ¶ 83 (1996) (First Order).

In rulemakings under the 1996 Act, as in rulemakings under TOCSIA, the FCC identified Section 201 as one source of its authority to prescribe regulations. See, *e.g.*, First Order, 11 F.C.C.R. at 20,720 ¶ 364; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 F.C.C.R. 1778, 1845 ¶ 166 (1997); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 F.C.C.R. 2545, 2648 ¶ 232 (1999) (1999 Order). In the first rulemaking, the FCC requested comment on its tentative conclusion that it should exercise its jurisdiction under Section 201(b) "to ensure that PSPs are compensated for international as well as interstate and intrastate calls." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 F.C.C.R. 6716, 6726 ¶ 18 (1996). After considering comments on that question, the FCC concluded that Section 201(b) provided statutory "authority * * * to ensure that PSPs are fairly compensated for international as well as interstate and intrastate calls." First Order, 11 F.C.C.R. at 20,569 ¶ 54.[2] Various IXCs, including petitioner Global Crossing and amici Sprint and AT&T, participated in this rulemaking. Some IXCs sought review of other aspects of the First Order, but none sought review of the FCC's assertion of Section 201(b) jurisdiction. Indeed, AT&T's comments endorsed the FCC's tentative conclusion. Comments of AT&T Corp. at 5 (July 1, 1996).

In its 1999 Order, the FCC decided that its per-call compensation rate would not include allowances to cover the bad-debt expenses that PSPs incurred when IXCs refused to pay the amounts they owed. 1999 Order, 14 F.C.C.R. at 2618-2620

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[2] The FCC also invoked its authority under Section 4(i),47 U.S.C. § 154(i), which authorizes the promulgation of rules that are "necessary in the execution of [the Commission's] functions."

¶¶ 160-162. PSPs challenged that decision in the D.C. Circuit. Several IXCs – including amici Sprint and AT&T – intervened to defend the FCC's decision. Relevant portions of their 1999 brief are attached as an Addendum. The IXCs argued that the FCC's decision to exclude bad-debt costs was reasonable because a carrier's "failure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties. See 47 U.S.C. §§206-08, 501-03." Final Joint Brief of Long Distance, Paging, and Consumer Intervenors in Support of Respondents at 15, *APCC* v. *FCC*, No. 99-1114 (filed Sept. 7, 1999), Addendum, *infra*, 5a.

The IXCs' 1999 assertion *necessarily* means that a failure to pay compensation violates *the Act* and that damage actions can be brought *in federal court* (and not merely in FCC proceedings). That is so because Section 206 establishes liability only for violations of "this Act," and Section 207 states that injured parties "may either make complaint to the Commission * * * or may bring suit * * * in * * * district court." Although Global Crossing asserted seven years later in *this* Court that it is a "fact" that "payphone service providers' right to bring claims to the FCC seeking to enforce FCC regulations derives from the FCC's powers described in 47 U.S.C. § 154(i), not from section 206 or 207" (Reply Br. in Support of Cert. 3 (Jan. 11, 2006)), the IXCs did not cite Section 154(i) – but did cite Sections 206-208 – to the D.C. Circuit.

The D.C. Circuit agreed that unpaid compensation could be recovered under Sections 206-208 and relied on that proposition in holding that the FCC's exclusion of bad-debt costs was reasonable. *American Public Communications Council* v. *FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) (*APCC* v. *FCC*). The court devoted considerable attention to PSPs' remedies for unpaid debt, quoted the IXCs' brief, and noted that the FCC would be devoting still more attention to the issue (*ibid.*):

In upholding the reasonableness of the Commission's exclusion of the bad debt element from coinless call cost, we are mindful of the nature of the debt involved. As intervenor long distance carriers remind us, the "[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties." *See* 47 U.S.C. §§ 206-08, 501-03 (1994). The plight of the allegedly uncompensated payphone service provider does not equate to that of a merchant pursuing deadbeat customers in the marketplace. Furthermore, for any harm that may be done to the PSPs, they are not left without remedy. After noting that it was "unable to generate a sufficient record on this question for issuing this Order," the FCC invited the parties to file petitions for clarification on the bad debt issue. Third Order, 14 F.C.C.R. 2545 ¶ 162, 1999 WL 49817. The RBOC Coalition has made such a filing; the Commission has received that petition; sought and received comments; and, is considering the issue. *See Common Carrier Bureau Seeks Comment on the RBOC/GTE/SNET Payphone Coalition Petition for Clarification Regarding Carrier Responsibility for Payphone Compensation Payment,* CC Docket No. 96-128, DA 99-730 (1999), *available at* 1999 WL 335783.

In a further notice of proposed rulemaking, the FCC asked "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 18 F.C.C.R. 11,003, 11,012 ¶ 19 (2003). To address the bad-debt issue, the FCC sought, again, to determine the available remedies for nonpayment of required compensation. PSPs argued that IXCs should be required to pay for all calls (with a right to recover from switch-based resellers when appropriate) because PSPs had difficulty collecting from the switch-based resellers. AT&T, in re-

sponse, pointed to PSPs' right to obtain damages under Sections 206-208. Comments of AT&T Corp. at 19 (June 23, 2003).

The FCC again supported the position of the IXCs. Echoing AT&T's comments, the FCC opted to leave PSPs responsible for pursuing collection of the unpaid compensation, emphasizing the court of appeals' previous statement that Sections 206-208 provided a remedy to recover unpaid compensation. The FCC then stated, unequivocally, "A failure to pay in accordance with the Commission's payphone rules * * * constitutes both a violation of section 276 and an unjust or unreasonable practice in violation of section 201(b) of the Act." *2003 Payphone Order*, 18 F.C.C.R. at 19,990 ¶ 32.

The recognition in 2003 that a violation of the regulations could support a damages suit in federal court thus repeated a position that the FCC – *and IXCs* – had taken repeatedly starting in 1999, and was a direct response to the question asked in paragraph 19 of the 2003 further notice of proposed rulemaking. It is flatly untrue that the *2003 Payphone Order* "assert[ed] for the first time – and without any prior notice – that the regulations could * * * support damages suits in federal court." Pet. Br. 30.

B. The Proceedings Below

Despite the FCC rules, Global Crossing and other IXCs have failed to pay the required compensation for millions of calls, and PSPs have sought recovery in federal court. See, *e.g.*, JA 11-12, 15; *APCC Services, Inc.* v. *Sprint Communications Co.*, 418 F.3d 1238 (D.C. Cir. 2005), petition for cert filed, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766). When PSPs have invoked the remedies that IXCs assured the FCC would be effective, IXCs have argued that no such remedies exist.[3]

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[3] Sprint, for example, argued successfully in the D.C. Circuit in *APCC Services* – and now argues in its amicus brief in this Court – that a failure to comply with the FCC's payphone compensation *regulations* is not and cannot

1. In 2001, Metrophones brought separate lawsuits in the United States District Court for the Western District of Washington against several long-distance carriers, including Global Crossing, seeking an accounting and payment of unpaid compensation dating from the second quarter of 1999. After Global Crossing filed for bankruptcy, however, the court stayed Metrophones' case against Global Crossing.

In 2003, Metrophones filed a new complaint relating to payments that Global Crossing had failed to make since it had declared bankruptcy. JA 4-15. Metrophones alleged that Global Crossing had paid it, on average, only 10 cents per coinless call, well short of the 24-cent default rate established by FCC regulations, thereby accruing a deficit of $31,330.42. JA 15.

Metrophones' complaints at all times invoked the express private right of action in Section 206. *E.g.*, JA 12. A right of action exists under that section, however, only if a common carrier has violated some other section of the Communications Act. Metrophones initially cited Section 276 in both its 2001 and 2003 complaints as the provision Global Crossing had violated. In 2003, however, the Ninth Circuit held in *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047, 1051, that PSPs have no right of action under Section 206 for violations of Section 276.

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be a violation of *the Act*, and that Sections 206-208 authorize actions only based on violations of *the Act*. Sprint Br. 11-12. Notably, if Sections 206-207 do not authorize a damages action in court for a violation of the payphone compensation regulations, Section 208 cannot possibly authorize a damages action *before the FCC* for such a violation either, since Section 208(a) requires an action "in contravention of" the Act and Section 207 makes clear that the matters for which damages may be pursued before the Commission and those for which damages may be pursued in court are the same, with the complainant having its option of forums. Yet the D.C. Circuit asserted without explanation in *APCC Services*, 418 F.3d at 1247, that "the question here is not so much whether there is a private right of action, but where – directly in district court, or in the Commission."

Metrophones moved to amend its complaint to assert violations of Sections 201(b), 407, and 416 of the Act, as well as certain state-law theories of recovery. JA 39-44, 55-56. Global Crossing moved to dismiss on the ground that *Greene* foreclosed Metrophones' Section 276 claim, and that the proposed amendments would be futile. The district court dismissed the Section 276 and 407 claims, but allowed Metrophones to proceed under Sections 201(b) and 416(c), as well as state law.

2. Global Crossing obtained permission under 28 U.S.C. § 1292(b) to appeal to the Ninth Circuit, which affirmed in part and reversed in part. The court began by noting (Pet. App. 6a-7a) that it had resolved the Section 276 question in *Greene*, so it confined its substantive discussion to the newly asserted theories under Section 201(b), Section 416(c), and state law.[4] Although it rejected Metrophones' Section 416(c) argument and certain of its state-law claims, the Ninth Circuit agreed with Metrophones (Pet. App. 8a-21a) that Global Crossing's failure to pay dial-around compensation violated Section 201(b)'s prohibition on "unjust or unreasonable" "practices * * * in connection with * * * communication service."

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[4] During oral argument, Metrophones twice made clear its disagreement with *Greene*, though it recognized that the Ninth's Circuit's views on Section 276 were, for the time, a *fait accompli*. See statements 19:35 and 30:00, http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm, Case No. 04-35287. Likewise, the FCC – which had not participated in *Greene* – filed an amicus brief in the Ninth Circuit stating (at 12 n.1) that it disagreed with *Greene*. The Ninth Circuit noted that Metrophones "ha[d] not appealed the dismissal of its claim under § 276." Pet. App. 9a n.4. Nevertheless, that court could have reached – and this Court can reach – the question whether Section 276 supports a private right of action under Section 206. See *Yamaha Motor Corp. U.S.A.* v. *Calhoun*, 516 U.S. 199, 204-205 (1996) (appellate jurisdiction under Section 1292(b) applies to the entire district court order, and is not tied to the particular question formulated by the district court); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.35, at 444-445 (8th ed. 2002) (a prevailing party may defend a judgment on any ground properly raised below) (citing numerous supporting authorities); pp. 39-50, *infra*.

"Significant[]" to the Ninth Circuit's decision was that the FCC had embraced the same interpretation of Section 201(b), not only in paragraph 32 of its *2003 Payphone Order*, but also in an amicus brief filed in support of Metrophones. Pet. App. 9a, 13a. The Ninth Circuit reasoned that the FCC's views merited *Chevron* deference. Although the *2003 Payphone Order*'s statement regarding Section 201(b) was succinct, it "did not appear to have been made in anticipation of litigation" – to the contrary, it "arose in the context of a complex decision about the operation of the whole system of payphone regulation," and it was "apparent that the Commission considered the ability of PSPs to recover compensation for dial-around calls in private actions to be integral to the proper functioning of the payphone compensation system." Pet. App. 11a. "In short," the court said, it is obvious that "the Commission relied on the availability of actions for damages under §§ 206 and 207" when considering and crafting the *2003 Payphone Order*. Pet. App. 13a.

The Ninth Circuit also concluded that the FCC's amicus brief, filed in support of Metrophones, merited deference under *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). The court found "no reason to think that the interpretation" it contained was "not the 'fair and considered judgment'" of the FCC. Pet. App. 13a (quoting *Bank of Am.* v. *City & County of San Francisco*, 309 F.3d 551, 563 n.7 (9th Cir. 2002)). Finally, the court held that, although Section 276 preempted certain of Metrophones' state-law claims, it did not preempt its claims for *quantum meruit* and breach of implied contract. Pet. App. 24a-38a.

Global Crossing sought certiorari on two questions: (1) whether Section 201(b) "creates" a private right of action for violation of the FCC's dial-around compensation regulations; and (2) whether Section 276 preempts PSPs' state-law claims for *quantum meruit* and breach of implied contract. This Court granted certiorari on the first question. Properly phrased, however, the issue is *not* whether Section 201(b) "creates" a private

cause of action – no party or court has ever advanced that proposition in this litigation. Rather, the question is whether *Sections 206-207* give rise to a private cause of action for violation of the FCC's dial-around compensation rules, because a violation of those rules constitutes a violation of the Act.

SUMMARY OF ARGUMENT

I. Section 201(b) of the Communications Act provides that "any * * * charge [or] practice * * * that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b). The Act's *express* private right of action allows damages in court whenever a common carrier "shall do * * * any act, matter, or thing in this chapter * * * declared to be unlawful." 47 U.S.C. § 206. Because in Section 201(b) all unjust or unreasonable practices are "declared to be unlawful" – the very language of Section 206 – *every* unjust or unreasonable practice by a common carrier gives rise to an *express* right of action. Congress, not a court or an agency, has created that capacious right of action.

In a notice-and-comment rulemaking, and at least two amicus briefs, the FCC has confirmed its agreement with the commonsense proposition that, because PSPs' ability to recover compensation for coinless calls is integral to the proper functioning of the payphone regulatory regime, an IXC's failure to pay that compensation is an "unjust or unreasonable" "practice" under Section 201(b). As the agency charged with administering the complex and evolving telecommunications regime established in the Communications Act, the FCC is entitled to *Chevron* deference for its well-considered interpretations of ambiguous statutory phrases. The Ninth Circuit therefore correctly held that an IXC's violation of Section 201(b), as interpreted by the FCC, gives rise to a private right of action in federal court.

A. Because the terms "unjust," "unreasonable," and "practice" in Section 201(b) are ambiguous with respect to an IXC's

failure to compensate a PSP, the Court should defer to the FCC's reasonable interpretation of those terms.

1.a. Section 201 governs the activities of common carriers in two contexts: (1) when they deal with end users of communications services; and (2) in their relationships with other telecommunications service providers, when each is providing a component of an integrated service offered to end users. Global Crossing proposes to limit the reach of Section 201, in the second context, only to a common carrier that is a "seller" of a component service dealing with a "customer." That reading of the statute is inconsistent with – not compelled by – the language of the statute. And it is inconsistent with authority holding that the statute governs such relationships, whether or not the common carrier acts as a "seller" of component services.

Global Crossing's construction of the "practice[s]" governed by Section 201 would produce arbitrary and irrational results. As Global Crossing emphasizes, PSPs are "sellers" and IXCs are "buyers" in the present context *only* because the FCC chose a compensation plan in which end users pay IXCs and IXCs pay PSPs. The formalistic characterization of PSPs as "suppliers" to IXCs does not change the substance of the relationship between them. Each provides an essential component of an integrated communications service.

Nor is there any reason to limit the reach of Section 201 to the kinds of "practices" that are described in carriers' tariffs. The FCC and the courts have long understood that other kinds of practices, including deceptive marketing practices, may be unjust or unreasonable practices that are forbidden by Section 201, even though such practices are not governed by tariffs.

b. There is no "jurisdictional mismatch" between Section 201, which governs "interstate or foreign" communication, and Section 276, which also governs intrastate communications. The "jurisdictional mismatch" argument was never made to the

courts below, and has therefore been forfeited. It is also wrong on its merits. The FCC's "interstate" authority under Section 201(a) extends even to intrastate service when there is more than a *de minimis* percentage of interstate traffic and it is difficult to sort out the interstate and intrastate services.

2. Because the language of Section 201(b) is ambiguous, courts owe *Chevron* deference to the FCC's reasonable construction of that section. The *2003 Payphone Order* resulted from a notice-and-comment rulemaking that focused on whether PSPs have adequate means to collect compensation from IXCs. The FCC's conclusion – that failure to pay just and fair compensation is unjust and unreasonable – is eminently reasonable in light of the fact that Congress added Section 276(b)(1)(A) to the Act in 1996 specifically "to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."

a. Deference to the *2003 Payphone Order* is not precluded merely because its reasoning affects a PSP's ability to pursue a remedy in federal court. There is no exception to *Chevron* for agency decisions that establish the presence of private rights of action. This is evident from analogy to cases in which Congress has delegated to an agency the power to make decisions carrying preemptive force, and the Court has deferred to the agency's exercise of its discretion. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982).

b. The brevity of the FCC's statement in the *2003 Payphone Order* does not preclude deference. The context of that statement makes clear that it incorporates prior understandings that a violation of the FCC's compensation rules violates the Act itself, thus suggesting violations of Sections 276 and 201(b). Given these precedents, the FCC's reasoning is clear without any lengthy exegesis.

What is more, in amicus briefs in both the Ninth and D.C. Circuits, the FCC explained the reasoning in the *2003 Payphone Order*. In *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997), the Court deferred to reasoning in an amicus brief after finding "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."

B. The FCC reasonably – and correctly – concluded that an IXC's violation of the FCC's payphone rules constitutes an "unjust or unreasonable" practice under Section 201(b). There is nothing just and reasonable about refusing to pay a valid debt.

II. Beyond Section 201(b), Global Crossing's violation of the payphone rules also violates Section 276(b)(1)(A), which is designed "to ensure that all payphone service providers are fairly compensated for each and every completed * * * call using their payphone." As the Court has explained, "it is * * * meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001). Because the FCC's payphone rules authoritatively interpret Section 276 by providing such details as the party responsible for compensating PSPs, a violation of those rules is a violation of the Act and gives rise to a right of action under Section 206.

The payphone rules do not "go beyond" Section 276 simply because they provide details that the statute does not. The point of delegation is to allow agencies to use their expertise to elucidate general legislative dictates, and Congress's purpose in instructing the FCC "to establish a per call compensation plan" to compensate PSPs was to allow the FCC to provide those details.

There is no need to conduct a *Sandoval*-type analysis of Section 276 to determine whether it contains rights-creating language. *Sandoval* is an *implied*-right-of-action case that says

nothing to foreclose an *express* right of action. If a *Sandoval*-type analysis were appropriate here, however, it would be pellucidly obvious – the Ninth and D.C. Circuits to the contrary notwithstanding – that Section 276 contains rights-creating language. Section 276 was enacted for the benefit of PSPs, enhancing the prior TOCSIA regime that had not been sufficient to assure adequate compensation to PSPs. Section 276 also speaks in terms of the party benefited – the PSPs – rather than the party ordered to pay, a clear signal of congressional intent to create rights. And the phrasing of Section 276 in strong words of entitlement – the FCC "*shall* take *all actions necessary* * * * to establish a per call compensation plan *to ensure* that *all* payphone service providers are fairly compensated for *each and every* completed * * * call" – confirms that Congress intended PSPs to have enforceable rights.

ARGUMENT

Global Crossing's failure to compensate PSPs for coinless calls violated the FCC's payphone rules, which have been upheld (in decisions not challenged here) as creating a just and fair compensatory regime. That failure to pay fair compensation constitutes an "unjust or unreasonable" "practice" under Section 201(b), as the FCC has determined repeatedly. Global Crossing's rules violation also constitutes a violation of Section 276(b)(1)(A) itself, because the payphone rules authoritatively interpret the statute. Sections 206-207 provide an express right of action for each of those statutory violations.

I. Global Crossing's Failure To Pay Dial-Around Compensation Constitutes An Unjust Or Unreasonable Practice Under Section 201(b), And Is Therefore Actionable In Federal Court Under Sections 206-207

Global Crossing is a "common carrier." When it carries dial-around calls from payphones, it is providing a "communication service" described in Section 201(a). Its refusal to com-

pensate PSPs for such calls, as required by law, is an "unjust or unreasonable" "practice" "in connection with" the offering of that "communication service." 47 U.S.C. § 201(b).

Nevertheless, Global Crossing's brief begins – as early as the Question Presented page – by asking the wrong question, one that then infects its entire analysis of Section 201(b). The issue is not, as Global Crossing would have it, whether *"§ 201(b)* of the Communications Act of 1934 *creates* a private right of action" for violations of the FCC's dial-around compensation rules. Pet. Br. (i) (emphasis added); *id.* at 9 (same). No party to this litigation has ever suggested that Section 201(b) creates a private right, and the Ninth Circuit did not so hold. Rather, the question is whether the express right in *Sections 206-207* enables a PSP to sue an IXC for violating the payphone compensation rules, on the theory that such failure to pay is an "unjust or unreasonable" "practice" under Section 201(b).

Permeating Global Crossing's brief is the suggestion that it is not plausible that Congress intended, in Section 201(b) alone, to create a private right of action for violation of the FCC's payphone compensation rules. *E.g.*, Pet. Br. 11. But Congress – through unambiguous statutory *text* – has declared that *all* unjust or unreasonable practices by common carriers violate the Act, and that there is a private right of action for any violations of the Act by common carriers. Global Crossing conceded that point in oral argument before the Ninth Circuit: "If there is a violation of 201(b), * * * I would agree that would supply the basis for a private damages remedy." Statement at 37:23, http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm, Case No. 04-35287. There is a violation of Section 201(b) – and therefore a cause of action under Section 206 – whenever there is an unjust or unreasonable practice, and there is no need for further evidence of congressional intent to create a cause of action beyond the text of Section 206.

A. Because The Terms "Unjust," "Unreasonable," and "Practice" Are Both Broad and Ambiguous, *Chevron* Deference Is Owed To The FCC's Authoritative Interpretation Of The Statute

As this Court said in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services, Inc.*, 125 S. Ct. 2688, 2699 (2005), "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." Thus, the Court must first ask whether the text of Section 201(b) is ambiguous as to whether it encompasses violations of the FCC's payphone compensation rules. If so, and the FCC's authoritative interpretation of that Section is reasonable, the interpretation must be upheld. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). And that is so "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 125 S. Ct. at 2699.

1. The Text and Structure of Section 201(b) Do Not Unambiguously Resolve Its Applicability To A Carrier's Violation Of The FCC's Payphone Rules

The Ninth Circuit was correct that the text of Section 201(b) itself does not clearly resolve whether it encompasses violations of the FCC's payphone compensation rules. "The terms 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms." *Capital Network Sys., Inc.* v. *FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994). The term "practice" – which is commonly defined as "a repeated or customary action" (WEBSTER'S NEW INTERNATIONAL UNABRIDGED DICTIONARY 1780 (3d ed. 1986)) – is similarly broad, and certainly capable of encompassing Global Crossing's violations of the payphone compensation rules. We address the term "practice" first, and then the question – which is not difficult or complex – whether the

FCC had room to declare it "unjust or unreasonable" for an IXC to accept services without paying for them.

a. Section 201(b) is not limited to carriers' relationships with their customers

Section 201 governs the activities of common carriers in two contexts. *First*, it regulates common carriers' dealings with end users of communications services by, among other things, requiring just and reasonable charges for such services. *Second*, it regulates common carriers' dealings with other telecommunications service providers (including but not limited to other common carriers) when each party in that relationship provides an essential component of a communications service. It governs, for example, a common carrier's practices concerning "physical connections with other carriers," the establishment of "through routes and charges applicable thereto," and "the divisions of such charges." 47 U.S.C. § 201(a).

Global Crossing proposes to limit the reach of Section 201 so that it would apply in the *second* context only to common carriers that "sell" one component of a communications service to another party, which uses that component, in conjunction with others, to serve end users. Under that interpretation, Section 201 would not apply to the practices of common carriers that "buy" a component of the service and sell it to end users.

But no court has ever accepted Global Crossing's proposed limitation of the phrase "practice * * * in connection with * * * communications service" to encompass *only* a carrier's relationship with its customers.[5] Nothing in the language of the statute

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[5] This Court has rejected, in a different context, the argument that "the words 'charges,' 'classifications,' 'practices,' and 'regulations' appear throughout the Act in contexts where it is clear that what is meant is charges which relate directly to carriers' rate and service relationships with their customers," and that those terms must always be *limited* to such relationships. *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 371 (1986).

suggests, let alone requires, such a limitation, and Global Crossing cites no authority supporting that limitation – all authority is to the contrary. Section 201 has been applied to a number of dealings between a common carrier and parties that are *not* the common carrier's customers.[6]

Section 201 has been applied, for example, to govern the "sale" of access services by local exchange carriers to IXCs. See, *e.g.*, *MCI Telecomms. Corp.* v. *FCC*, 59 F.3d 1407, 1414 (1995) (Section 201(b) makes unlawful a carrier's violation of agency regulations setting maximum rate of return for interstate access services provided to another carrier). But it has also been applied to govern an IXC's refusal to pay for access services it "purchased" from a local exchange carrier. See, *e.g.*, *MGC Communications, Inc.* v. *AT&T Corp.*, 14 F.C.C.R. 11,647, 11,659 (1999) (applying Section 201(b) when AT&T refused to pay for access services it had ordered from a local exchange carrier); see also *Ascom Comm'ns, Inc.* v. *Sprint Comm'ns Co.*, 15 F.C.C.R. 3223 (2000) (Section 201(b) makes unlawful a carrier's attempt to collect from a PSP for unauthorized and fraudulent calls placed from a PSP's phones over a carrier's network).[7]

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[6] Some of the non-customers to which Section 201 has been applied are themselves common carriers, but it is not necessary in this case to consider whether PSPs are common carriers. The sole point is that Section 201 applies to a broader swath of relationships than common carriers' dealings with their customers – the limitation Global Crossing proposes.

[7] Although the FCC in subsequent cases has identified compensation disputes between carriers that it will not declare to involve unjust or unreasonable practices (see *U.S. Telepacific Corp.* v. *Tel-America of Salt Lake City, Inc.*, 19 F.C.C.R. 24,552 (2004); *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 F.C.C.R. 7457 (2004)), it has never retreated from the proposition that the term "practices" can encompass a carrier's dealings with other service providers, including a carrier's failure to pay compensation in some settings, and that "practices" are not limited to a carrier's dealings with its customers.

The words "practice" "in connection with" a service suggest, if they do not compel, a broader scope, to encompass a carrier's practices when it deals with other parties such as PSPs whose services are an integral component of the service the carrier provides to its customers. That broader reading of Section 201(b) is both natural and necessary to effectuate the second clause of Section 201(a), which authorizes the Commission to require physical connections between carriers and through routes, the "charges applicable thereto and the divisions of such charges." If Global Crossing's reading of Section 201(b) were correct, limiting that subsection's reach to a carrier's dealings with its customers, Section 201(b) could *not* be invoked to enforce the Commission's orders or to regulate carriers' "practices in connection with" the division of charges among carriers referenced in Section 201(a). Nothing suggests that Section 201(b) was meant to effectuate the first clause of Section 201(a) but not the second; indeed, the FCC has long understood that Section 201(b) applies to the enforcement of physical connection orders among carriers under Section 201(a). See *MTS and WATS Market Structure, Phase III, Establishment of Physical Connections and Through Routes Among Carriers*, Notice of Proposed Rulemaking, 94 F.C.C.2d 292 (1983) ("Section 201(b) * * * requires all carrier practices relating to the * * * establishment of physical connections and through routes to be just and reasonable."). And both clauses of Section 201(a) must be given effect. That is why the D.C. Circuit held that the Commission could not rely on the first clause in Section 201(a) to impose an obligation on AT&T to accept access services; such an obligation must arise from the second clause in that section, which can be invoked only after an opportunity for a hearing. *AT&T Corp.* v. *FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002).

Global Crossing's strained interpretation of the statutory language would introduce arbitrary and irrational results because the question whether a telecommunications service provider is a "buyer" or a "seller" in this context has nothing to do

with the reasons for regulating (or not) that provider's practices. In this case, as Global Crossing emphasizes, PSPs appear to be "sellers" and IXCs appear to be "buyers" only because the FCC designed its compensation plan to permit IXCs to collect compensation from end users for the use of a payphone and to remit that compensation to PSPs. Regulation of dial-around services could just as easily have developed in a manner that allowed PSPs to collect the money in the first instance, a point Global Crossing emphasizes. See Pet. Br. 23 ("The FCC's regulations would be perfectly valid if they required callers, instead of carriers, to compensate payphone service providers for coinless calls."). If PSPs collected payments from customers, no money would flow to them from IXCs. The fact that money does flow from IXCs to PSPs creates the *illusion* that PSPs are "selling" a service to carriers, but in truth each party – the PSP and the IXC – provides a service to the caller, for which each is supposed to be compensated. There is no "buyer" or "seller," merely a collection arrangement as part of the integrated offering of a telecommunications service by multiple parties.

When the components of a service are provided by multiple parties, there is no reason to suppose that Congress intended a carrier's statutory obligation to act justly and reasonably to depend on the form of the relationship between the parties, rather than its economic substance – especially when nothing in the statutory language requires that approach. Indeed, Global Crossing's invitation to adopt such a formalistic approach could wreak havoc far beyond the context of payphone disputes and undermine Congress's fundamental objective of promoting competition in the telecommunications industry. In contrast to the bygone world of Ma Bell, when a single carrier handled most communications from one end to the other, a competitive telecommunications market requires myriad interconnections among different carriers, as well as efficient inter-carrier compensation arrangements in the common situation in which only one of those parties has a direct billing relationship with the end

user. Global Crossing's construction would place such matters beyond the reach of Section 201(b).

Nor is there any reason to construe the term "practices" to encompass only those practices that may be described in tariffs. The FCC has long construed Section 201(b)'s prohibition on "unjust or unreasonable * * * practices" to reach common carriers' fraudulent or misleading advertising practices, even though those practices are neither governed by filed tariffs, nor directed to the carrier's existing customers. In 1992, the FCC admonished AT&T for "confusing or misleading" marketing practices and "caution[ed] AT&T that further actions of the nature described herein may result in a finding that Section 201(b) has been violated." *Letter of Admonishment*, 7 F.C.C.R. 7529, 7530 (1992). Six years later, the FCC found that another carrier's telemarketing practices were unjust and unreasonable under Section 201(b). *Business Discount Plan, Inc.*, 14 F.C.C.R. 340, 355 (1998). Most recently, the FCC issued a joint policy statement with the Federal Trade Commission, which reiterated that "unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b)." *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*, 15 F.C.C.R. 8654, 8655 (2000). This established understanding that Section 201(b) applies to common carriers' misleading marketing statements made to non-customers is a natural application of the phrase "unjust or unreasonable" "practice," but it cannot be reconciled with Global Crossing's proposed limitation.[8]

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[8] Courts have reached the same conclusion as the FCC. See *In re Long Distance Telecomms. Litigation*, 831 F.2d 627, 628-632 (6th Cir. 1987) (accepting district court's conclusion that IXCs' failure to disclose their billing policies was within the scope of activities governed by Section 201(b) and affirming primary-jurisdiction referral of the question of reasonableness to the FCC); *In re Wireless Telephone Federal Cost Recovery Fees*

b. There is no "jurisdictional mismatch" between Sections 201(b) and 276

This Court should not entertain Global Crossing's and its amici's newly fashioned claim that there is a "jurisdictional mismatch" between Section 201, which governs "interstate or foreign" communication, and Section 276, which also includes intrastate communication. Pet Br. 37; AT&T Br. 13-14. Although Global Crossing, AT&T, Sprint, and other IXCs were parties to the rulemaking proceedings that led to the *2003 Payphone Order*, no IXC challenged that order in a court of appeals under the Hobbs Act, 28 U.S.C. § 158, the proper procedural vehicle for a "jurisdictional mismatch" argument against the FCC's conclusion that Section 201(b) applies to an IXC's failure to compensate a PSP. What is more, although IXCs' failures to compensate PSPs have been fully litigated through two different federal courts of appeals, until now no party has ever suggested that a federal court determine the relative jurisdiction-

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Litigation, 2004 WL 3671053, at *16 (W.D. Mo. Apr. 20, 2004) (defendant's argument that "Section 201(b) does not provide a cause of action for deceptive advertising or billing practices * * * has no merit"). Despite some loose language, cases such as *Pinney* v. *Nokia, Inc.*, 402 F.3d 430 (4th Cir.) ("A 'practice in connection with' wireless service does not * * * include tortious conduct such as deceptive advertising and billing by wireless service providers in the provision of wireless telephone service") (citing *Marcus* v. *AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998)), cert. denied, 126 S. Ct. 551 (2005); *Gilmore* v. *Southwestern Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916 (N.D. Ill. 2001); and *In re Wireless Radio*, 327 F. Supp. 2d 554 (D.D.C. 2004), are not to the contrary. In those cases, plaintiffs alleged fraudulent and misleading advertising practices under state law, and defendants attempted to remove the cases to federal court on the theory that the Communications Act completely preempts those state-law claims. These courts merely decided that the Communications Act was not so clearly preemptive as to overcome the appropriate reluctance to "find that extraordinary pre-emptive power * * * that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 66 (1987).

al scopes of those sections. "Ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, there is no material "mismatch" between the two sections. In *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 376 n.4 (1986), this Court stated that the FCC may regulate intrastate communications when the communications have interstate components and where it is "*not* possible to separate the interstate and the intrastate components of the asserted FCC regulation." See also *Public Serv. Comm'n of Md.* v. *FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (FCC regulation of jurisdictionally mixed communications is permissible if it is necessary to protect valid federal regulatory objective and it is not feasible to unbundle intrastate and interstate components). Under these precedents, the FCC has asserted authority over jurisdictionally mixed communication services. *E.g.*, *Policies and Rules Concerning Interstate 900 Telecommunications Services*, Report and Order, 6 F.C.C.R. 6166, 6180 (1991) (record established that "neither the local exchange carriers, interexchange carriers, nor information providers will know whether the call is intrastate and thus within the state's jurisdiction"), aff'd on reconsideration, 8 F.C.C.R. 2343 (1993) (regulating jurisdictionally mixed traffic "after finding that the traffic to a single 900 number could not be jurisdictionally sorted").

The FCC has interpreted federal authority over jurisdictionally mixed communications to extend to communications involving more than a *de minimis* interstate component. See *GTE Telephone Operating Cos.*, 13 F.C.C.R. 22,466, 22,479 (1996) (ADSL service qualifies as "interstate" for purposes of Section 201 because more than a trivial amount of ADSL communication is interstate); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 F.C.C.R. 15435 (2001) (applying *de minimis* approach with regard to a cross-connect service between collocators and other carriers provided pursuant to Section 201). In practice, the

de minimis threshold has required only that the interstate component constitute at least 10% of the overall call volume. *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 F.C.C.R. 5660 (1989) (establishing 10% test); *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 F.C.C.R.. 22,404, 22,422 n.106 (2004) (citing *MTS and WATS* approach with approval). The 10% approach to jurisdictionally mixed communications has been judicially approved. *E.g., Qwest Corp.* v. *Scott*, 380 F.3d 367 (8th Cir. 2004).

Thus, the "interstate and foreign" language in Section 201(a) has never been construed as rigidly as Global Crossing suggests; instead, federal jurisdiction has been extended pragmatically to jurisdictionally mixed communications where there is a substantial interstate component and it is not feasible to segregate intrastate and interstate traffic. Significantly, Section 201 authorizes the FCC to regulate these jurisdictionally mixed services even when the intrastate component of the service, if it could practicably be segregated, would be expressly reserved for state regulation (and expressly beyond the reach of FCC regulation) pursuant to 47 U.S.C. § 152(b). For payphone calls, unlike other kinds of communications, Congress has unequivocally rejected any sphere of state autonomy. It has declared that the FCC must ensure payphone compensation for both intrastate and interstate calls, and has authorized the FCC to preempt any state regulation that interferes with that objective. 47 U.S.C. § 276(c). In light of this fact, there should be no presumption in favor of a narrow reading of the FCC's jurisdiction under Section 201 over mixed intrastate/interstate payphone services; rather, there should be a presumption in favor of a broad reading of that jurisdiction.

There is thus no necessary "mismatch" between Sections 201 and 276, particularly for dial-around traffic, which by

its very nature is overwhelmingly long-distance and substantially interstate; for local calls, people simply use coins.[9] What is more, it is tremendously complicated, if not practically impossible, to segregate interstate and intrastate dial-around traffic. In the round of rulemaking the led to the *2003 Payphone Order*, Global Crossing's comments stressed the difficulty of tracking any one payphone call (let alone keeping records of millions of them to separate intrastate from interstate calls). See Comments of Global Crossing North America, Inc., at 2 (June 23, 2003) ("The basic issue that the Commission needs to confront is the complexity of tracking a payphone-originated call to completion in a multiple-carrier environment."); *id.* at 3 ("in a multiple-carrier environment, there is no single entity that can track a call from origination to completion"); *id.* at 4 ("there is no single party that is capable of tracking a call from origination to completion").

Because it is very difficult for PSPs to distinguish interstate from intrastate dial-around calls, requiring them to guess the proper jurisdiction for recovery of dial-around compensation would plainly frustrate Congress's objective "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). Given these difficulties, it is entirely natural that both Congress and the FCC would have thought Section 201(b)'s language to extend to all dial-around payphone traffic.

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[9] Even for calls made using prepaid calling cards, which logically are more likely than other types of dial-around calls to be intrastate, the FCC just last month adopted "a default presumption that" only "50 percent of traffic is jurisdictionally intrastate," rejecting a proposal to presume that 80 percent of traffic is jurisdictionally intrastate. *Regulation of Prepaid Calling Services*, Declaratory Ruling and Report and Order, FCC 06-79, 2006 WL 1826190, at *11 ¶ 36 (released June 30, 2006).

To the extent that the record in this case does not contain a discussion of the precise composition of dial-around traffic and the administrative difficulties involved in segregating it, that is the direct result of Global Crossing's (and other IXCs') failure either to challenge the *2003 Payphone Order* under the Hobbs Act, or to raise this issue at any time during the years of litigation in the lower courts, when such factual development would have been available. Petitioner and its amici should not be permitted to eschew their administrative remedies and abstain from making available arguments below, only then to sandbag respondent and this Court with an argument that implicates facts not contained in the record.

Finally, if the issue had been preserved and the scope of Section 201(b) were not broad enough to reach *all* dial-around calls (intrastate as well as interstate), the proper solution would not be to invalidate, for "jurisdictional mismatch," an otherwise-valid FCC interpretation of Section 201(b). The solution would be to limit the reach of the Section 206 damages action based on Section 201(b) to interstate calls only. Because the Ninth Circuit held that there is a Section 206 damages action for *all* violations of the regulations (and did not carve out intrastate calls, in part because no one asked it to do so), any interpretation of Section 201(b) that limited its reach to interstate calls would require consideration of whether the Ninth Circuit's judgment could be affirmed in its entirety on alternate grounds. Because it is clear that the Ninth Circuit's *Greene* decision was wrong, and that this Court may reach the issue, it would be appropriate to affirm on the basis that a violation of the regulations, with respect to *either* interstate or intrastate calls, is a violation of Section 276 and actionable under Section 206. See pp. 39-50, *infra*.

2. *Chevron* Deference Is Due To The FCC's Permissible Construction Of The Ambiguous Language In Section 201(b)

Given the statutory ambiguities, deference is warranted to the FCC's authoritative and reasonable interpretation of Section 201(b), as set forth in the *2003 Payphone Order*. Indeed, the order is so plainly dispositive that the D.C. Circuit was able to hold that an IXC's violation of the payphone rules does not violate Section 201(b) only by *failing even to mention it*. See *APCC Services*, 418 F.3d at 1254 (Ginsburg, C.J., dissenting). Not surprisingly, Global Crossing makes no attempt to defend the reasoning of the *APCC Services* majority.[10]

The *2003 Payphone Order* is plainly an authoritative interpretation of the sort that warrants *Chevron* deference, issued as it was after full notice-and-comment rulemaking proceedings. Throughout the rulemaking proceedings leading up to it, the

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[10] The panel majority's reasoning in *APCC Services* is indefensible for additional reasons. The *only* question under Section 201(b) is whether failure to comply with the FCC's dial-around compensation rules is an unjust or unreasonable practice. Yet the D.C. Circuit's opinion never actually answered that question. Instead of holding that such a failure is "just" and "reasonable" – as it would have to be for there *not* to be a private right of action under Congress's express words – the D.C. Circuit focused on the different question whether the FCC *has declared* the practice to be unjust or unreasonable. The answer to *that* question is indisputably yes, but the D.C. Circuit somehow answered it no. It never reached the underlying *statutory* question whether an IXC's failure to pay *is* an unjust or unreasonable practice. In effect, the D.C. Circuit held that every common carrier practice – no matter how unjust, no matter how unreasonable – complies with Section 201(b) unless and until the FCC says otherwise. See 418 F.3d at 1248 ("We do not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none. We do say the Commission did not attempt to exercise any such power here."). This Court, however, has rejected the argument that a rate or practice does not become unreasonable until an administrative agency so declares. *Reiter* v. *Cooper*, 507 U.S. 258, 267-268 (1993).

existence of PSPs' private remedies against IXCs was central to the FCC's thinking; in fact, the FCC's focus on that issue was largely caused by *the IXCs'* insistence that such remedies were available. See pages 4-5, *supra*. The court of appeals agreed that compensation could be recovered under Sections 206-208 – quoting the IXCs' brief on the point – and relied on that fact in holding that the FCC's exclusion of bad-debt costs was reasonable. *APCC* v. *FCC*, 215 F.3d at 56.

Then, in the 2003 NPRM, the FCC asked "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated." 18 F.C.C.R. at 11,012 ¶ 19. AT&T, in response, pointed to PSPs' right to recover damages under Sections 206-208 and argued that PSPs "should use those remedies rather than simply shift the collection problem to someone else." Comments of AT&T Corp. at 19 (June 23, 2003). The FCC again supported the position of the IXCs. Echoing AT&T's comments, the FCC opted to leave PSPs responsible for pursuing collection of the unpaid compensation, emphasizing the court of appeals' previous statement (*APCC*, 215 F.3d at 56) that Sections 206-208 provide a remedy to recover unpaid compensation. The FCC explained that "[a] failure to pay in accordance with the Commission's payphone rules * * * constitutes both a violation of section 276 and an unjust or unreasonable practice in violation of section 201(b) of the Act." *2003 Payphone Order*, 18 F.C.C.R. at 19,990 ¶ 32.

Given that a PSP's ability to pursue remedies against IXCs was central to the complex regulatory regime that the FCC established in its payphone rules, the FCC's conclusion that an IXC's regular violation of those rules "constitutes * * * an unjust or unreasonable practice" is more than reasonable. Indeed, the rules were promulgated under Section 276, which Congress enacted "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones." And there is no question that the FCC's payphone rules, which are intended to ensure that just

compensation, establish a just and fair regime. See *APCC*, 215 F.3d at 52 (upholding rules). As Chief Judge Ginsburg put it, "[o]ne would * * * be hard-pressed to say the Commission acted unreasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice." *APCC*, 418 F.3d at 1255 (Ginsburg, C.J., dissenting).

Despite the *2003 Payphone Order*'s authoritative statement of the FCC's position on a question it clearly considered, Global Crossing offers three reasons why this Court should not defer to it. *First*, Global Crossing asserts that the order "is centrally concerned with providing a [federal] remedy," and argues that deference should not be afforded when an agency speaks on matters of federal jurisdiction. Pet. Br. 30-32 *Second*, it suggests that deference is not due because the order does not contain a sufficient exegesis of the reasoning behind the FCC's conclusion. *Id.* at 33-34. *Third*, it suggests that it is an unreasonable interpretation of Section 201(b). *Id.* at 35-41. None of those arguments withstands scrutiny.

a. The FCC's interpretation of the terms in Section 201(b) is not precluded from receiving *Chevron* deference merely because it has implications for rights of action

It is difficult to make sense of Global Crossing's argument that deference is not due to the FCC's statement because it is "centrally concerned with providing a remedy." Pet. Br. 30.[11]

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[11] The D.C. Circuit agreed with Global Crossing, stating – without citation of authority – that, "[g]iven the potential consequences to judicial dockets of the Commission's making that finding, we should require a clear statement (and analysis) by the agency." *APCC Services*, 418 F.3d at 1248. That proposition was so indefensible that AT&T and Sprint disavowed it in the very first paragraph of their response to the PSPs' rehearing petition. "In their petition, Appellees ('APCC') wrongly charge that the panel devised a new test * * * for assessing whether an agency interpretation of a statute warrants deference under *Chevron* * * * – namely, whether the interpretation has

Congress, not the FCC, created the express right of action in Sections 206-207 to remedy violations of the Act, and Congress likewise chose to delegate interpretive authority to the FCC by including the broad and ambiguous terms "unjust," "unreasonable," and "practice" in Section 201(b). It cannot be that an agency's interpretation of ambiguous statutory language receives no deference merely because Congress elsewhere provided that statutory violations give rise to private rights of action.

Adams Fruit Co. v. *Barrett*, 494 U.S. 638 (1990), certainly does not stand for the proposition that courts should not defer to agencies' views on questions that affect private rights of action. But see Pet. Br. 31. There, the statute included an express right of action that was silent as to whether it preempted state-law remedies. The Department of Labor issued a regulation interpreting the "gap" in the statute to mean that the federal remedies were exclusive, but the Court did not defer to its interpretation because it held that there was in fact no statutory gap, *i.e.*, that Congress intended no delegation. 494 U.S. at 650. That case has no implications for the dispute over Section 201(b), where Congress *did* create statutory gaps that signal delegation to the FCC. See *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 501-502 (2002) (deferring to FCC's construction of what is "just and reasonable"); *Brand X*, 125 S. Ct. at 2699 (citing Section 201(b) in support of holding that "[t]he *Chevron* framework governs our review of the Commission's construction").

When Congress has delegated to an administrative agency the general authority to make rules that carry preemptive force, and litigants have challenged the resulting regulations on the ground that Congress did not itself specify the preemptive federal rule, this Court has rejected the challenges. "[A] narrow fo-

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'consequences to judicial dockets.' Pet. 2. The panel adopted no such test." Appellants' Opposition to Appellees' Petition for Rehearing and Rehearing *En Banc* at 1, No. 04-7034 (D.C. Cir.) (filed Sept. 20, 2005).

cus on Congress' intent to supersede state law [is] misdirected." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982). Instead, the question is whether the regulation "is within the scope of the [agency's] delegated authority." *Ibid.*

Nor does Global Crossing's narrower theory – that this *particular* interpretation is not deference-worthy because it was improperly motivated – fare any better. As a factual matter, Global Crossing's revisionist history suggesting that the *2003 Payphone Order* "implicitly responded" to the Ninth Circuit's holding in *Greene* (Pet. Br. 30) is unfounded: the Ninth Circuit decided *Greene* on August 25, 2003, but the NPRM that gave rise to the *2003 Payphone Order* was issued months before, on May 28, 2003. As explained in detail above, that NPRM was centrally concerned with "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated" (18 F.C.C.R. at 11,012 ¶ 19), a question that naturally implicated the availability of private rights of action.

The "motives" argument also fails for a more fundamental reason. Whether an agency's interpretation "responds" to a court decision has no bearing on whether the interpretation is permissible under *Chevron*. It is entirely possible for an agency to exercise its discretion reasonably in response to a decision with which it disagrees (see *Brand X*, 125 S. Ct. at 2700-2702), or to include a statement reacting to a recent development after the agency's position has been formed internally. The Ninth Circuit deferred decision in this case until this Court had decided *Brand X* (see JA 3), and then recognized that *Brand X* left "no doubt that *Greene* does not prevent us from affording deference to the FCC's interpretation of § 201(b)" (Pet. App. 10a). Yet Global Crossing invites *this* Court to make the same error for which the Ninth Circuit was reversed in *Brand X*, by failing to defer to an FCC interpretation just because it supposedly responded to a decision with which the FCC disagreed.

b. The brevity of the FCC's statement does not preclude *Chevron* deference

In its *2003 Payphone Order*, the FCC reasoned that, because switch-based resellers were the "primary economic beneficiaries" of coinless calls, it was most efficient for them to compensate PSPs. 18 F.C.C.R. at 19,990 ¶ 28.[12] The PSPs, however, had vigorously opposed that outcome because of their lack of leverage to collect on bad debts. Speaking to that concern, the FCC reassured the PSPs that "the D.C. Circuit, in upholding the reasonableness of the Commission's decision in *APCC v. FCC*, found that the PSPs had remedies to recover this debt from the delinquent carriers. A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *Id.* ¶ 32.

The FCC simply applied an established principle to a familiar situation. In *APCC*, the case to which the FCC referred, the D.C. Circuit had spoken to the bad-debt issue, agreeing with *intervenor IXCs' observation* that "[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties," and citing 47 U.S.C. §§ 206-208. 215 F.3d at 56; see Addendum, *infra*. Sections 206-208 provide a private right of action for any violation of the Act. The court's necessary implication was that

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[12] The FCC has *never* found, as Global Crossing claims at page 4 of its brief, that, "as the 'primary economic beneficiar[ies]' of the practice, the callers 'should bear the burden of paying compensation for these calls.'" Paragraph 86 of the First Order, 11 F.C.C.R. at 20,586, which Global Crossing cites, does not say that callers are the primary economic beneficiaries. The preceding paragraph rejects a proposal under which "payments would not be borne by either the primary economic beneficiary of payphone calls or the cost causer," making it clear that the FCC did not regard "cost causer" and "primary economic beneficiary" as the same thing. *Id.* at 20,587 ¶ 85.

a violation of the FCC's rules violates one or more statutory provisions. See also note 3, *supra*.

Thus, by the time of the *2003 Payphone Order*, precedents established that a violation of FCC rules designed to compensate PSPs violates the Act. It is understandable that the FCC did not include in the order an exegesis on the metaphysical bounds of justness and reasonableness, or a detailed set of criteria to distinguish the regulatory violations that will be deemed unjust or unreasonable from those that fall below such a threshold.[13]

Nevertheless, Global Crossing attempts to pry the FCC's statement out of its context, arguing that "the statement was not the product of sufficient deliberation or explanation to warrant any deference." Pet. Br. 33 (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*)). The suggestion that the statement was "not the product of sufficient deliberation" is simply wrong, as it was made by the full Commission (not some

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[13] The D.C. Circuit responded to the absence of such detailed criteria, in either the Commission's order or the parties' briefs, by asserting that "[a]t the heart of plaintiffs' argument is the notion that it is inherently an unreasonable practice, within the meaning of § 201(b), to violate a Commission regulation." *APCC Services*, 418 F.3d at 1247. That characterization of PSPs' position is not at all accurate. The Code of Federal Regulations is littered with FCC regulations that common carriers could violate without doing anything that in normal parlance would be called an unjust or unreasonable practice. *E.g.*, 47 C.F.R. § 42.6 (retention of toll records); *id.* § 43.11 (reports of local exchange competition data); *id.* § 63.500 (applications to remove trunk lines); *id.* § 64.804 (extending credit to political candidates). What PSPs and the FCC have *actually* argued – in marked contrast to the straw man the D.C. Circuit set up – is that it is unjust or unreasonable to violate the regulations the FCC validly adopted pursuant to a congressional *command* to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones" (47 U.S.C. § 276(b)(1)(A)). If flouting that command by systematically refusing to pay valid debts is just and reasonable – and so plainly just and reasonable that an FCC determination to the contrary fails *Chevron* step two – then it is difficult to conceive of what practices would violate Section 201(b).

subordinate official) after full notice-and-comment proceedings that placed the nature of PSPs' remedies against IXCs squarely at issue. As for the suggestion that the FCC should have more fully explained its reasoning, given the existing precedents, it is unremarkable that it did not do so. Indeed, when placed in context, the presupposition of the FCC's statement – that a carrier's failure to pay just and fair compensation is an unjust or unreasonable practice – is quite clear. This Court has extended *Chevron* deference to a "necessary presupposition" of an agency statement under review, even though that reasoning was not contained in the statement itself. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 420 (1992).

There are at least two further reasons why the brevity of the statement in the *2003 Payphone Order* should not preclude deference to the FCC's interpretation of Section 201(b). *First*, the *Chenery* principle – in which courts are reluctant to accept agency determinations they deem inadequately explained – is applicable to *direct review* of agency decisions, but is not a part of the *Chevron* doctrine as applied in the context of litigation between private parties. *Second*, this Court extends *Chevron* deference not only to formal rulemakings, but also to amicus briefs filed in circumstances where it is clear that they represent the agency's own considered judgment.

i. It is a bedrock principle of administrative law, famously stated in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*), that, when an agency's judgment is based on a determination that the "agency alone is authorized to make," a reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency." Accord *Chenery I*, 318 U.S. at 92, 94. But "[t]he *Chenery* case sets forth a rule for courts reviewing administrative decisions." *Building & Construction Trades Department, AFL-CIO* v. *U.S. Department of Labor Wage Appeals Board*, 829 F.2d 1186, 1189 (D.C. Cir. 1987). It is not a part of the *Chevron* deference doctrine. See

ibid. ("The *Chenery* rule, however, does not apply when the question presented is one of statutory construction.").

Had Global Crossing sought review of the *2003 Payphone Order* in a court of appeals under the Hobbs Act, 28 U.S.C. § 158, Global Crossing might have been entitled to the benefit of the *Chenery* principle, and there might have been force to Global Crossing's argument (Pet. Br. 34 n.7) that appellate briefs should be disregarded as *post hoc* rationalizations. Global Crossing, however, did *not* seek such Hobbs Act review. Arguably its current arguments should be disregarded entirely as an impermissible collateral attack on the *2003 Payphone Order*. See *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970). Even if those arguments are entertained, however, they require application of the *Chevron* doctrine, not the *Chenery* doctrine.

Chevron step two requires deference to any *reasonable* agency policy choice. *Brand X*, 125 S. Ct. at 2702 (citing *Chevron*, 467 U.S. at 845). When a *Chevron* issue arises in private litigation like this case, the Court cannot – as it can on direct review of administrative action – remand to the agency for a better explanation of its action. See, *e.g.*, *Chenery I*, 318 U.S. at 95 (remanding). The agency's interpretation either is reasonable or it is not, and there is no reason – as there might be on direct review – for a court to blind itself to factors that might show the agency's reasonableness just because they are stated in a brief rather than in the agency's own order. Those who find an agency's reasoning too terse may challenge it on direct review, but they may not forgo direct review and then try to achieve the same result (or a better one) by misapplying *Chenery* as if it were a part of the *Chevron* doctrine.[14]

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[14] If paragraph 32 of the *2003 Payphone Order* had been challenged on direct review under the Hobbs Act, acceptance of Global Crossing's *Chenery*

ii. The FCC submitted amicus briefs to the Ninth and D.C. Circuits in which it explained the *2003 Payphone Order* further. In *Auer* v. *Robbins*, 519 U.S. 452 (1997), this Court made clear that, in appropriate circumstances, it will defer to an agency's reasoning set forth in an amicus brief even when that reasoning is not grounded in any more formal statement. The question in assessing agency interpretations offered in briefs is whether there is any "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. In cases to which the *Chenery* doctrine applies, "courts may not accept appellate counsel's *post hoc* rationalizations" for agency action (*Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)), and in all contexts they may not defer to an agency position "urged *only* in the context of [a] litigation" (*Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (emphasis added)). Under each of those formulations, the problem is that the reviewing court has no assurance that the reasoning offered is in fact *the agency's own* considered reasoning, as opposed to a lawyer's reasoning to which the agency itself may not subscribe.

In this case, however, Global Crossing *conceded* before the Ninth Circuit that the reasoning set forth in the FCC's amicus brief was the agency's own. When asked by the court why it should not defer to the FCC's brief under *Auer*, counsel admitted that "[t]he agency would not disavow it – no argument with that, your Honor." Statement at 7:59, http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm, Case No. 04-35287. As in *Auer*, "there is simply no reason to suspect that the interpretation does not reflect the agency's fair and

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argument would have led to a remand for a more complete explanation of the agency's reasoning. Here, by contrast, Global Crossing wants to use the *Chenery* argument – as AT&T and Sprint did in *APCC Services* – to obtain a judicial determination not that the *2003 Payphone Order* is inadequately explained, but that it is an *impermissible* construction of the Act.

considered judgment on the matter in question." 519 U.S. at 462. Indeed, the FCC's briefs merely complement the agency's formal statement in the *2003 Payphone Order*.

B. The FCC's Interpretation of Section 201(b) Is Reasonable

The FCC's Ninth Circuit amicus brief explained that "an IXC's failure to compensate payphone providers for dial-around calls under FCC rules requiring 'fair compensation' of PSPs * * * is an 'unjust and unreasonable' practice within the meaning of § 201(b) 'in connection with' the IXC's provision of 'communications service.'" Brief of FCC as Amicus Curiae, *available at* 2004 WL 2297782 at *10. That conclusion is eminently reasonable.

No party or amicus has come right out and said that a refusal to pay fair compensation in accordance with FCC rules is "just" and "reasonable." Global Crossing, however, soft-pedals an equivalent suggestion by saying that there is "nothing 'unjust or unreasonable'" about it. Pet. Br. 35. This, it claims, is because callers – not IXCs – are the "cost causer[s]" when they place coinless calls from payphones. First Order, 11 F.C.C.R. at 20,585 ¶ 85. Global Crossing reasons that "it is callers who *ought to be* paying payphone service providers for the use of their payphones," and "a carrier's failure to pay a payphone service provider to compensate for the actions of callers is hardly unjust or unreasonable." Pet. Br. 35-36 (emphasis altered).

This argument about what the FCC's regulations "ought to" say misses the point. It is no defense to a regulatory violation to argue that the regulation itself reflects unwise policy judgments. Even if the FCC *could have* assigned to callers the responsibility for compensating PSPs, it exercised its policy discretion to place that responsibility on IXCs instead, and that arrangement was upheld on judicial review. See *APCC*, 215 F.3d at 52. That being so, the time to debate the fairness of an

IXC-pays system is long past – the issue now is *whether the violation of an FCC rule* ordering IXCs to compensate PSPs is an unjust or unreasonable practice.

Even if this Court determined that the FCC's interpretation of Section 201(b) is not entitled to *Chevron* deference, the analysis would not be at an end. Metrophones' core allegation is that Global Crossing's failure to pay compensation was unjust and unreasonable in violation of Section 201(b). With or without *Chevron* deference, that *statutory* assertion must be addressed. In *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001), the Court held that, even when an agency statement does not qualify for *Chevron* deference, courts should nevertheless consider it for its persuasive value under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944) (looking to an agency's care, consistency, formality, relative expertness, and persuasiveness). The FCC not only reached the commonsense conclusion that welching on a debt is unjust or unreasonable – particularly when Congress has expressed concern about the subject in Section 276 – but also did so in the context of a set of interrelated provisions in which the existence of remedies was key to setting the level of payphone compensation and not including a bad-debt component. The FCC relied, moreover, on *IXCs'* judicially accepted arguments that a damages remedy would be available *under Sections 206-208*. The FCC's reasoning should be completely persuasive under *Skidmore*.

II. A Violation Of The FCC Payphone Rules Constitutes A Violation of Section 276, For Which Sections 206-207 Provide A Private Right Of Action

The judgment of the court below is that Metrophones may proceed with its private right of action under Sections 206-207 to collect the amounts withheld by Global Crossing in violation of the payphone regulations. The Ninth Circuit so held because it perceived a violation of the payphone regulations to be a violation of Section 201(b). That holding was correct, but the

judgment may be affirmed on the alternate ground that a violation of the payphone regulations is a violation of Section 276.

The Ninth Circuit's rejection of the Section 276 argument is no impediment to affirmance on the Section 276 ground. See note 4, *supra*. And there is no doubt that the Section 276 argument was preserved below. "[A] claim is preserved if made by the current litigant in the recent proceeding upon which the lower courts relied for their resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent." *United States* v. *Vonn*, 535 U.S. 55, 59 n.1 (2002) (internal quotations omitted) (quoting *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992)). Metrophones was a party to *Greene*, where it argued that a violation of the FCC's dial-around compensation rules amounted to a violation of Section 276. The Ninth Circuit relied on *Greene*'s treatment of Section 276 throughout its *Global Crossing* opinion. Pet. App. 6a-7a. Metrophones certainly has never "concede[d] * * * the correctness" of *Greene*. Although it did not explicitly quarrel with that holding in its *Global Crossing* brief – at the time of briefing the panel was powerless to depart from it – Metrophones' counsel twice stated Metrophones' disagreement with *Greene* during oral argument. Statements at 19:35 and 30:00, http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm, Case No. 04-35287.

What is more, "a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even if the parties fail to identify and brief the issue." *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 440 (1993); *Town of Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1991) (considering issue logically antecedent to those decided by court of appeals). Analysis of Section 276 is logically antecedent to consideration of Section 201(b), because throughout its brief Global Crossing argues that Metrophones is using Section 201(b) as an end run around Congress's supposed *prohibition* in Section 276 of

pursuit of a private damages action. *E.g.*, Pet. Br. 3 ("The issue presented here is whether the Ninth Circuit's decision allows through the back door the sort of cause of action that Congress has barred from coming through the front."); *id.* at 10 ("If section 276 does not require carriers to compensate payphone service providers for coinless calls, then the generalized language of section 201(b) cannot be read as doing so either."); see also Sprint Br. 4 ("the Ninth Circuit inexplicably strayed from the text and structure of § 276 in holding that § 201(b) affords the basis for private enforcement of the payphone regulations through the right of action * * * in §§ 206 and 207").

In reaction to PSPs' inadequate ability to collect compensation under the existing TOCSIA regime, in 1996 Congress ordered the FCC "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call." 47 U.S.C. § 276(b)(1)(A). To accomplish that goal, Congress directed the FCC to "establish a per call compensation plan" for PSPs. *Ibid.* Thus, in Section 276, Congress mandated that PSPs be compensated for all coinless calls, and delegated to the FCC determining how to carry out that mandate.

The FCC decided that IXCs should compensate PSPs for coinless calls, and promulgated rules to that effect. 47 C.F.R. § 64.1300 *et seq.* Global Crossing's violations of those rules, which authoritatively interpret Section 276, give rise to a right of action under Sections 206-207 because "it is * * * meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Sandoval*, 532 U.S. at 284.

The Ninth Circuit, however, rejected that reasoning for two reasons. *First*, it held that, although Section 276 "directs the FCC to come up with a plan for compensation, * * * it does not

establish a *right* to compensation," which it interpreted *Sandoval* to require. *Greene*, 340 F.3d at 1050. *Second*, it noted that Section 276 "does not say 'PSPs shall be entitled to fair compensation,' or 'IXCs shall pay PSPs,'" and therefore held that an IXC's failure to pay does not amount to a violation of Section 276. *Ibid.* That analysis gets *Sandoval* exactly backwards. *Sandoval* requires courts to look for rights-creating language only in the absence of an *express* right of action, which the Communications Act provides in Sections 206-207. What *Sandoval does* establish is that the silence in Section 276 regarding the party responsible for compensating PSPs is unhelpful to Global Crossing's position; because Congress identified a beneficiary of the compensation right it created, but delegated identification of the proper payor to the FCC, it intended that a violation of the FCC's rule be actionable in the same way as a violation of Section 276 itself.

A. Because Sections 206-207 Provide An Express Right Of Action For Any Violation Of The Act, There Is No Need To Look For Rights-Creating Language In Section 276 Itself

When Congress provides an express right of action in a statute, there is no need also to determine whether Congress intended to create a right by implication. *Sandoval*, an *implied*-right-of-action case, in no way alters that regime. There, the question was whether private individuals could sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. Section 601 of that Title had previously been held to create an implied private right of action to remedy an employer's *intentional* discrimination, but that section said nothing about conduct that had a disparate impact. 532 U.S. at 280-281. The Court therefore assumed that, at least under Section 601, such conduct was permissible. *Id.* at 281. It also assumed that the regulations themselves were validly issued under Section 602, which allowed agencies to craft rules to "effectuate the provisions of [§ 601]." *Id.* at 282.

The Court in *Sandoval* "d[id] not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section." 532 U.S. at 284. Because the disparate-impact regulations "forbid conduct that § 601 permits," however, the Court reasoned that they "do not simply apply § 601" (*id.* at 285), and thus it was forced to ask whether Section 602 – under which the regulations were issued – provided a right of action of its own independent force. The Court therefore asked whether Section 602 contained an implied right of action, looking to such factors as whether it contained "rights-creating" language. *Id.* at 286-293.

Sandoval looked for rights-creating language in Section 602 only because Title VI did not contain an express right of action. Had such a right been present, the question would have been whether the *scope of the express right* covered a violation of regulations issued under Section 602. *Sandoval* nowhere suggests that, even when an express right exists, it is inoperative unless supplemented with rights-creating language elsewhere; to the contrary, it says that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 286. By providing an express remedy in Sections 206-207 of the Communications Act, Congress has made the judicial task easy indeed.

B. The Express Right Of Action In Sections 206-207 For A Carrier's Violation Of The Act Encompasses Violations Of Regulations Authoritatively Interpreting Section 276

In *Sandoval*, before discussing whether Congress had implied a right of action for violations of regulations issued under Section 602, the Court made clear that, had the regulations governed *intentional* discrimination instead of acts with disparate impacts, it "d[id] not doubt" that they would have been "covered by the cause of action to enforce [§ 601]." 532 U.S. at 284.

"Such regulations, if valid and reasonable, authoritatively construe the statute itself, see * * * *Chevron* * * *, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Ibid.* That reasoning squarely applies to the FCC's payphone rules: because, as the D.C. Circuit has held (*APCC*, 215 F.3d at 52), the regulations authoritatively interpret Section 276, Congress intended the private cause of action in Sections 206-207 to apply as forcefully to violations of the rules as to violations of Section 276 itself.

Global Crossing offers two reasons why *Sandoval*'s clear statement should not apply to the payphone rules. *First*, it argues that its violations of the payphone rules do not violate Sections 206-207 because those sections provide a right of action only for statutory violations, whereas other provisions of the Act provide rights of action for violations of both statutes and regulations. Pet. Br. 12-19. That argument contradicts *Sandoval* and makes no sense on its own terms – there is no reason to believe that, in providing a right of action for any person injured by a common carrier's "act * * * declared to be unlawful * * * in this chapter" (47 U.S.C. § 206), and crafting Section 276 "to ensure that all payphone service providers are fairly compensated" (47 U.S.C. § 276(b)(1)(A)), Congress would not have intended that violations the regulations effecting its intent be actionable as a violation of Section 276 itself. Congress's purpose in phrasing Section 276 as an express delegation to the FCC – rather than spelling out all details itself – was not to curtail PSPs' rights found elsewhere in the Act. Rather, Congress intended that the FCC devise a reasonable system to *compensate* PSPs, exactly what Global Crossing's position would not do.

Second, Global Crossing argued in the Ninth Circuit – and the court held in *Greene*, 340 F.3d at 1052 – that violations of the payphone rules are not privately actionable because the rules

"go beyond" Section 276, much as the disparate-impact regulations in *Sandoval* "went beyond" intentional discrimination, the conduct forbidden in Section 601 of Title VI. In *Sandoval*, the Court made clear that an agency "can[not] conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." 532 U.S. at 291. Global Crossing notes that Section 276 does not identify the party responsible for compensating PSPs, and suggests that, by filling in the blank left by Congress, the FCC has assumed the role of *Sandoval*'s sorcerer.

That argument proves far too much. The Court said in *Chevron* itself that, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency *to elucidate* a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 843-844 (emphasis added); see also *Brand X*, 125 S. Ct. at 2699 ("ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion"); STEPHEN BREYER, ACTIVE LIBERTY 105 (2005) ("Legislation inevitably contains ambiguities and gaps. The agency that administers the statute is likely better able than a court to know how best to fill those gaps."). The very nature of elucidation and gap-filling is to provide details that flesh out Congress's general directives. *Id.* at 102-103. That is why, in *Sandoval*, the Court recognized a private right of action to enforce *regulations* dealing with intentional discrimination – because those regulations, promulgated pursuant to a delegation of authority to the agency, "authoritatively construe the statute itself." 532 U.S. at 284.

Because a major purpose of regulations is to provide details statutes do not, determining whether a regulation "goes beyond" a statute for purposes of *Sandoval* requires determining whether the details it provides are within the scope of discretion dele-

gated to the agency – not whether they "go beyond" the statute in the trivial sense of spelling out things the statute itself does not. In *Sandoval*, the statute that supported a private right of action was Section 601, but "the disparate-impact regulations d[id] not simply apply § 601 – since they indeed forbid conduct that § 601 permits." 532 U.S. at 285. *That* is what it means to "go beyond" a statute. Validly specifying details Congress did not itself spell out is the opposite of going beyond a statute.[15]

C. Even Under A *Sandoval* Approach That Looks For Rights-Creating Language, PSPs Would Have A Right Of Action Under Section 276

As explained above, the portion of *Sandoval*'s analysis that asks whether a statute contains rights-creating language is best read to apply only when a statute does not contain an express right of action. Because the Communications Act does contain an express right, no analysis of implied rights is necessary. Nevertheless, both the Ninth Circuit in *Greene*, 340 F.3d at 1051, and the D.C. Circuit in *APCC Services*, 418 F.3d at 1246, held it to be fatal to the PSPs' arguments that Section 276 sup-

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[15] Lower courts other than the Ninth and D.C. Circuits have understood that, when a statute sets forth a specific mandate and instructs an agency to fill in the details of how that mandate will be achieved, *Alexander* v. *Sandoval* is authority for enforcement of the resulting regulations through a private cause of action. *E.g.*, *Iverson* v. *City of Boston*, 452 F.3d 94, ___, 2006 WL 1789114, at *5 (1st Cir. June 30, 2006) ("a regulation that simply effectuates an express mandate contained in the organic statute may nonetheless be enforceable through the private right of action"); *Ability Center* v. *City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004) (holding that a regulation is privately enforceable because it "imposes requirements specifically envisioned by the statute," which orders the Attorney General to adopt regulations to meet certain statutory goals); *Chaffin* v. *Kansas State Fair Board*, 348 F.3d 850, 858 (10th Cir. 2003) (a private right of action is available because "[t]he regulations simply provide the details necessary to implement the statutory right").

posedly contains no "rights-creating language." That conclusion is utterly wrong.

Section 276 was expressly enacted for the benefit of PSPs. Under the TOCSIA regime, which existed before 1996, PSPs had inadequate compensation for dial-around calls. Section 276(b)(1)(A), which is expressly intended "to ensure that payphone service providers are fairly compensated," is Congress's reaction to that problem. The Ninth Circuit in *Greene* disagreed, stating that *the* purpose of Section 276 is instead to "'promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.'" 340 F.3d at 1052.

That is a false dichotomy: statutes can have more than one purpose. It is *typical* for statutes that create individual, judicially enforceable rights to do so *for a public purpose*. *E.g.*, 42 U.S.C. § 12101(a)(9) (Americans with Disabilities Act was passed in part because discrimination against the disabled "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"). If the *presence* of a purpose to benefit the public implied the *absence* of a purpose to create individually enforceable rights, then only crass special-interest legislation could ever contain "rights-creating language." The noble fact that a statute, *by creating individual rights*, serves the public interest is hardly a reason to pretend that it *only* protects the public interest and does not create individual rights. But see Sprint Br. 3 (claiming that "Section 276 was not enacted for the benefit of PSPs but rather * * * to the benefit of the general public"). Here, as the FCC correctly determined in 1999, the relevant statute serves *three* purposes: "Section 276 directs us to promulgate regulations that will achieve three basic policy objectives with respect to the provision of payphone services: (1) promoting a competitive payphone market; (2) ensuring the widespread deployment of payphones for the benefit of the general public; and (3) ensuring that providers of payphone services receive fair compensation

for every call made using their payphones." 1999 Order, 14 F.C.C.R. at 2547 ¶ 1.

Section 276(b)(1)(A) is phrased in terms of ensuring that PSPs are compensated, rather than ordering IXCs to pay compensation. A statute "with an unmistakable focus on the benefited class" is precisely the type that supports a right of action for that class. *Gonzaga University* v. *Doe*, 536 U.S. 273, 287 (2002) (quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 691 (1979)); see also 536 U.S. at 284. In contrast, "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289 (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)). Global Crossing's observation (Pet. Br. 23 & n.4) that Section 276 does not direct IXCs to compensate PSPs thus militates *in favor* of a private right of action for PSPs.

The fact that Section 276 orders *the FCC* to establish a plan ensuring that PSPs are compensated does not alter the conclusion that it is focused on protecting PSPs' rights. In *Sandoval*, the Court noted cases in which it has found no private right of action under statutes that focus "on the agencies that will do the regulating." 532 U.S. at 289. The statutes in those cases, however, were focused *exclusively* on the regulating agency. In *Sandoval*, for example, Section 602 directed the agencies "to effectuate the provisions of [§ 601] * * * by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. That statute says nothing whatever about the rights of individuals. Similarly, in *Universities Research Ass'n, Inc.* v. *Coutu*, 450 U.S. 754 (1981), the statute provided in relevant part that advertised specifications for federal contracts "shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics." That language simply instructs the agency to include certain language in its contracts; unlike Section 276(b)(1)(A), it does nothing "to ensure" anyone's rights.

In contrast to statutes directed solely to an agency without reference to the person benefited, when a statute instructs that someone take action for the clear benefit of a particular person, this Court has held that a right of action exists for the benefited person. See, *e.g.*, *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 544 (1937) (holding that right of action for representative existed under the Railway Labor Act where statute instructed that "the carrier shall treat with the representative so certified"). That is precisely the situation under Section 276(b)(1)(A): although it directs the FCC to craft a plan to ensure that PSPs are compensated, it is phrased that way only to make clear the extent and purpose of the FCC's delegated authority. It says, in effect, that PSPs shall be compensated for each and every coinless call, through a plan that the FCC shall design to ensure that outcome. Congress enacted the statute to ensure compensation, not just to ensure the existence of a plan.

Section 276(b)(1)(A) speaks in the imperative language of entitlement, not mere preference: "the Commission *shall* take *all actions necessary* * * * to prescribe regulations that * * * establish a per call compensation plan to *ensure* that *all* payphone service providers are fairly compensated for *each and every* completed intrastate and interstate call" (emphasis added). Unlike TOCSIA, which delegated discretion to the FCC to "consider" whether compensation was needed, Section 276 expresses an unambiguous congressional determination that *all* PSPs *must* be compensated, and for *every* completed call. This is the exact opposite of "an 'aggregate' focus," which Chief Justice Rehnquist's opinion for the Court in *Gonzaga* explained is characteristic of statutes that do *not* contain rights-creating language. 536 U.S. at 288 (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 343 (1997)).

An "individualized, concrete monetary entitlement" is the kind of rights-creating language that will support even an implied right of action and an action under 42 U.S.C. § 1983. *Gonzaga*, 536 U.S. at 288 n.6 (citing *Maine* v. *Thiboutot*, 448

U.S. 1 (1980); *Wright* v. *Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987); and *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990)). An entitlement on the part of "all" PSPs to an agency-devised "plan" that will "ensure" fair compensation for "each and every" call meets even that high standard. For the Ninth and D.C. Circuits to deny enforcement of Section 276 under the Communications Act's *express* private right of action, on the ground that Section 276 contains no "rights-creating language," was simply wrong.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ADDENDUM

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1114
and consolidated cases

AMERICAN PUBLIC COMMUNICATIONS COUNCIL, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Respondents.

On Petitions for Review of an Order of the Federal Communications Commission

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JOINT BRIEF OF LONG DISTANCE, PAGING AND CONSUMER INTERVENORS IN SUPPORT OF RESPONDENTS

STATUTES AND REGULATIONS

Sections 206-08 and 501-03 of the Communications Act of 1934, as amended (47 U.S.C. §§206-08, 501-03) are reproduced in the Statutory Addendum attached to this brief as Appendix A. In addition, Section 276 of the Communications Act of 1934, as amended (47 U.S.C. §276), and its implementing regulation, 47 C.F.R. §64.1300, are [2] reproduced in the Statutory Addendum to the Joint Brief of Petitioners MCI WORLDCOM, Inc. and Sprint Corporation, and Supporting Intervenors.

INTRODUCTION

The intervenors joining in this brief include long distance carriers, providers of paging services and other companies that make extensive use of toll-free (800) services in their business operations. These intervenors are entities that bear, directly or indirectly, the burden of paying compensation for coinless calls that is at issue in this proceeding. All of these intervenors joined in the Joint Brief of Petitioners MCI WORLDCOM, Inc. and Sprint Corporation,[1] and Supporting Intervenors (hereinafter "Brief of MCI WORLDCOM et al."), arguing that the per-call rate set by the FCC is plainly excessive in relation to the actual costs and call volumes of an efficient payphone service provider (PSP). At the same time, these intervenors support, in part, the FCC actions challenged by the PSP Petitioners.

* * * [3] * * * However, the PSPs claim that the rate set by the FCC is unreasonably low on three grounds: (1) the FCC erred in failing to require compensation for coinless

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[1] Sprint is both a petitioner and an intervenor. * * *

calls to include the capital costs of the coin mechanism; (2) the FCC erred in failing to include an allowance for bad debt and collection costs; and (3) the FCC miscalculated the number of calls made from a so-called "marginal" payphone. The Long Distance, Paging and Consumer Intervenors support the FCC on the first two issues. * * *

COUNTERSTATEMENT OF THE CASE

A. Exclusion Of The Costs Of The Coin Mechanism

* * *

[5] * * *

B. Bad Debt and Collection Costs

In the Third Order, the FCC declined to include in the per-call rate an allowance for bad debt and collection costs. Although the PSPs had sought reconsideration of the FCC"s earlier finding that there was insufficient information on the record to account for the costs relating to bad debt (see Third Order, ¶160 * * *), AT&T and Sprint argued that bad debt and collection costs will decrease as per-call compensation is instituted and that some of the alleged uncollectibles are actually legitimate billing disputes that arose during the earlier interim period, a period in which payment obligations remained unsettled. Id., ¶161 * * *.

The FCC concluded that thee PSPs' recent collection history is "not an accurate guide for future levels of bad debt." Id., ¶162 * * *. The FCC noted that it had no information on how much of the alleged uncollected per-call com-

pensation was due to billing errors of the PSPs, as opposed to carriers refusing to pay their alleged obligations. Id. The FCC also took note of an ex parte request by the RBOC Coalition to clarify the Commission's rules regarding which entities are required to pay compensation and pointed out that if such clarification were granted, "uncollectibles would be significantly reduced." Id. The FCC also found that if it built a bad debt allowance into the rate and [6] PSPs ultimately recovered their uncollectibles from delinquent carriers, a double recovery would result. For all of these reasons, the FCC found "that it would be unwise to establish a cost element for bad debt at this time." Id. * * *

* * *

SUMMARY OF ARGUMENT

* * * [7]

* * * The FCC also reasonably declined to include an allowance for bad debt and collection costs in the compensation rate. The FCC had good reason to be skeptical of the PSPs' claimed bad debt costs, since the PSPs, by their own admission, have no way of accurately counting the number of compensable calls. Moreover, unlike an ordinary commercial transaction, here the "purchasers" of service – long distance carriers – are directly under the FCC's jurisdiction and are compelled to compensate the PSPs by FCC rule. Accordingly, once the initial implementation problems of per-call compensation are worked out, it would be reasonable to expect the PSPs to experience virtually no bad debt. As for collection costs, the functions a PSP must perform to collect compensation are de minimis in nature, and thus the FCC properly refused to accept the PSPs' inflated estimates of these costs as well.

[8] **ARGUMENT**

* * * [13] * * *

II. THE FCC DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DECLINING TO INCLUDE ALLOWANCES FOR BAD DEBT AND COLLECTION COSTS IN THE COINLESS CALL RATE

In the Third Order, the FCC declined to include allowances for bad debt and collection costs in the per-call rate because the FCC found the PSPs' data supporting their claims were inaccurate and unreliable. Third Order, ¶¶162-164 * * *. The Long Distance, Paging and Consumer Intervenors support the FCC's response to the PSPs (FCC Br. at 47-49) but wish to supplement that discussion in just a few respects.

* * *

Second, although it may be reasonable, in ordinary commercial transactions, to build an allowance for uncollectibles into the prices for a firm's goods and services, the coinless call compensation here at issue is not ordinary. The duty to pay compensation [14] arises not from a voluntarily-entered contractual or tariff relationship, but rather from a mandatory FCC rule. Failure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties. See 47 U.S.C. §§206-08, 501-03. The carriers' implementation of per-call compensation was complicated by the fact that the FCC made several changes – sometimes at the last minute – in the ground rules for tracking compensable calls. * * * However, once the process has matured, one would expect full compli-

ance by the FCC's regulatees with its orders and rules, and thus a near-100% collection rate by PSPs. * * * If PSPs do not bother attempting to collect from some IXCs, other IXCs should not be burdened with the costs of the PSPs' election. * * *

* * * [16] * * *

CONCLUSION

The PSPs' petitions for review should be denied for the reasons discussed above.

Respectfully submitted,

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GLOBAL CROSSING TELECOMMUNICATIONS, INC.,

Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Pursuant to Rule 25.5 of the Rules of this Court, respondent Metrophones respectfully submits this supplemental brief to present a single late authority that was not available to be included in Metrophones' brief on the merits. Specifically, Metrophones calls to the Court's attention an Order the Federal Communications Commission (FCC) released on September 15, 2006, after briefing in this case was complete. App., *infra*, 1a-15a. The Order "take[s] th[e] opportunity to reaffirm and amplify what the Commission has concluded twice before: that 'failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment ..., constitutes ... an unjust and unreasonable practice in violation of secton 201(b) of the [Communications] Act.'" App., *infra*, 9a (ellipses in original) (quoting *2003 Payphone Order*, 18 F.C.C.R. at 19,990 ¶ 32); see App., *infra*, 9a-13a (elaborating).

Metrophones and the United States have argued in their briefs filed July 26, 2006, that the FCC had already said more than enough about this subject to merit *Chevron* deference, and that the FCC's conclusions are compatible with the governing statutory framework and reasonable. The new Order provides still further confirmation (though none should be necessary) of the reasonableness of the FCC's consistent interpretation. It also renders more untenable than ever the D.C. Circuit's decision – which conflicts with the Ninth Circuit decision below – in *APCC Services, Inc.* v. *Sprint Communications Co.*, 418 F.3d 1238, 1248 (D.C. Cir. 2005) ("We do not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none. We do say the Commission did not attempt to exercise any such power here."), petition for cert filed, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766).

The FCC's new Order is by no means necessary to allow this Court to resolve this case in respondent's favor. It cannot be ignored, however. An agency's "interpretation of [regula-

tions or statutes] in an administrative adjudication * * * *is* agency action, not a *post hoc* rationalization of it." *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991) (emphasis in original); see also *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996); *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002).

CONCLUSION

For the reasons stated above and in respondent's brief and the amicus brief supporting respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2006

APPENDIX

Federal Communications Commission

Order on Review

IN THE MATTER OF APCC SERVICES, INC., DATA NET SYSTEMS, LLC, DAVEL COMMUNICATIONS, INC., JAROTH, INC. D/B/A PACIFIC TELEMANAGEMENT SERVICES, AND INTERA COMMUNICATIONS CORP., COMPLAINANTS,

v.

NETWORKIP, LLC, AND NETWORK ENHANCED TELECOM, LLP, DEFENDANTS.
File No. EB-003-MD-011

FCC 06-139
Adopted: September 14, 2006
Released: September 15, 2006

By the Commission:

I. INTRODUCTION

1. In this Order on Review, we deny an Application for Review[1] filed by NetworkIP, LLC, and Network Enhanced Telecom, LLP (collectively, "Network") pursuant to section 1.115 of our rules.[2] The Application challenges a Memorandum Opinion and Order[3] released by the Enforcement Bureau ("Bureau") granting a liability complaint[4] filed by Complainants

[1] Application for Review, File No. EB-003-MD-011 (filed Mar. 1, 2005) ("Application").

[2] 47 C.F.R. § 1.115

[3] *APCC Services, Inc. v. NetworkIP, LLC*, Memorandum Opinion and Order, 20 FCC Rcd 2073 (Enf. Bur. Feb. 1, 2005) ("*Bureau Liability Order*").

[4] Formal Complaint, File No. EB-003-MD-011 (filed June 3, 2003)

(collectively, "APCC") against Network pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[5] The *Bureau Liability Order* found, *inter alia*, that Network's failure to compensate APCC for certain completed payphone calls in accordance with section 64.1300 of our rules[6] violated section 201(b) of the Act.[7] As explained below, Network's Application presents no facts or arguments that persuade us that the Bureau made any procedural or substantive errors. Consequently, we affirm the *Bureau Liability Order* and deny the Application.[8] In doing so, we reiterate that, consistent with common industry parlance, the term "facilities-based" carrier, as used in our payphone compensation rules and orders, means an entity that has a possessory interest in a switch involved in routing the calls for which compensation is sought.

II. BACKGROUND

2. The *Bureau Liability Order* explains in detail the factual and legal background of the dispute raised in this formal complaint proceeding.[9] In brief, Complainants are, or act as the billing and collection agents of, payphone service providers

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("Complaint").

[5] 47 C.F.R. § 208.

[6] 47 C.F.R. § 64.1300. Unless otherwise indicated, all C.F.R. references to Part 64 of the Commission's rules are to the rules in effect during the period October 7, 1997 through November 23, 2001.

[7] 47 U.S.C. § 201. *See, e.g., Bureau Liability Order*, 20 FCC Rcd at 2074, ¶ 1, and 2085, ¶ 26.

[8] APCC filed a motion to strike Network's Application on procedural grounds. Complainants' Motion to Strike Defendants' Application for Review, File No. EB-003-MD-011 (filed Mar. 16, 2005). *See* Opposition to Complainants' Motion to Strike, File No. EB-03-MD-011 (filed Mar. 23, 2005). Because we are denying the Application on substantive grounds, we dismiss APCC's motion as moot.

[9] *Bureau Liability Order*, 20 FCC Rcd at 2074-78, ¶¶ 2-13. We incorporate by reference those explanations.

("PSPs").[10] Network is a telecommunications carrier that owns switches and offers other entities a package of telecommunications services that enables those entities ("Debit Card Providers") to provide pre-paid calling cards to end-user customers.[11] The parties dispute whether it is Network or the Debit Card Providers who bears the responsibility under our rules and orders for payment of dial-around compensation to APCC for certain completed "coinless" payphone calls, *i.e.*, coinless calls that were routed, in part, by a Network-owned switch, and that were made by end users from APCC's payphones using prepaid calling cards sold by Debit Card Providers.[12]

3. As the *Bureau Liability Order* stated, the applicable rule during the relevant period was the following: with respect to each call at issue, whichever entity -- Network or a Debit Card Provider -- was the last identified "facilities-based" carrier before the terminating local exchange carrier ("LEC") in the chain of entities responsible for the call (hereinafter, the "last 'facilities-based' carrier") must compensate APCC for the use of its payphones to place those calls.[13] The *Bureau Liability Order* further found, based on Commission precedent, that to be "facilities-based," a carrier must have a possessory interest in a switch used to route the calls.[14]

4. Applying those standards to the facts here, the *Bureau Liability Order* concluded that Network, and not the Debit Card

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[10] *Bureau Liability Order*, 20 FCC Rcd at 2074, ¶ 2.

[11] *Bureau Liability Order*, 20 FCC Rcd at 2077, ¶¶ 9-10.

[12] *Bureau Liability Order*, 20 FCC Rcd at 2078-79, ¶ 13, 2080-81, ¶ 17, 2082-83, ¶ 21, 2083, ¶ 22, 2084, ¶ 24.

[13] *Bureau Liability Order*, 20 FCC Rcd at 2077-78, ¶¶ 10-11. Network effectively acknowledged that rule below (*Bureau Liability Order*, 20 FCC Rcd at 2079, ¶ 14) and does not challenge that rule here.

[14] *Bureau Liability Order*, 20 FCC Rcd at 2079-82, ¶¶ 14-20.

Providers, was the last "facilities-based" carrier, because Network, and not the Debit Card Providers, was the last non-LEC carrier in the chain of entities responsible for the call who had a possessory interest in a switch used to route the calls. In so concluding, the *Bureau Liability Order* rejected Network's argument that the Debit Card Providers were "facilities-based" because the Debit Card Providers could track call completion data from Network's switches via the Internet.[15] In other words, the *Bureau Liability Order* rejected Network's contentions that, in this context, call tracking ability equates to switching capability, and switching capability makes an entity "facilities-based."[16] Accordingly, the *Bureau Liability Order* granted the Complaint and held that Network is the entity responsible for paying payphone compensation to APCC.[17]

III. DISCUSSION

A. The Bureau Correctly Determined that Network Is Liable for Payment of Dial-Around Compensation.

5. In its Application for Review, Network reiterates the same arguments it made below regarding the meaning of the relevant payphone compensation requirements. As it asserted previously, Network argues that, prior to the issuance of the *Bureau Liability Order*, the Commission had not clearly expressed the requirement that, to be considered "facilities-based" for payphone compensation purposes, an entity must have a possessory interest in a switch used to route the coinless payphone calls at issue.[18] According to Network, the Commission had previously suggested that an entity may be

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[15] *Bureau Liability Order*, 20 FCC Rcd at 2077-78, ¶¶ 10-12, 2082, ¶ 20.

[16] *Bureau Liability Order*, 20 FCC Rcd at 2083-84, ¶¶ 22-23.

[17] *Bureau Liability Order*, 20 FCC Rcd at 2079-80, 2085, ¶¶ 14-16, 26.

[18] Application at 12-16; Reply to Opposition to Application for Review, File No. EB-003-MD-011, at 2, 4, n.3 (filed Mar. 25, 2005) ("Reply").

considered a "facilities-based" carrier under the payphone compensation rules, even if the entity has no possessory interest in a switch, as long as the entity somehow manages, in some other way, to "maintain its own switching capability."[19] Network also asserts, as it did below, that the Debit Card Providers do "maintain their own switching capability," even though they do not have a possessory interest in a switch, because the Debit Card Providers have what Network describes as "call tracking ability."[20] Thus, in Network's view, the Bureau erred by applying a "possessory interest" standard and by declining to find that the Debit Card Providers are "facilities-based" carriers liable for payphone compensation.

6. We reject Network's assertions and affirm the Bureau's determinations, including the Bureau's interpretation of our precedent that "switching capability" means a possessory interest in a switch, such as a lease interest or ownership interest.[21] We conclude that Network's construction of Commission precedent (i) ignores the commonly understood meaning of the term "facilities-based;"[22] (ii) overlooks a reasonable interpretation of governing language in a key Commission order;[23] and (iii) undermines the primary purpose of the payphone compensation rules.[24] We also agree with the Bureau that Network's claim must fail, even assuming, *arguendo*, that an entity who "maintains its own switching

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[19] Application at 12-16; Reply at 4.

[20] Application at 16-18; *see* Reply at 3-4 (arguing that "switching capability" and "call tracking ability" are synonymous).

[21] *See, e.g., In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21277 at ¶ 92 (1996) (subsequent history omitted).

[22] *Bureau Liability Order*, 20 FCC Rcd at 2079, 2081, ¶¶ 15-16, 19.

[23] *Bureau Liability Order*, 20 FCC Rcd at 2081, ¶ 18.

[24] *Bureau Liability Order*, 20 FCC Rcd at 2082, ¶ 20.

capability" can be considered a "facilities-based" carrier despite lacking a possessory interest in a switch (which is not actually possible). Here, the Debit Card Providers had only call tracking ability. "Switching capability" and "call tracking ability" are not synonymous; the former encompasses far more functions than the latter.[25] Thus, Network has failed to demonstrate that the Debit Card Providers "maintain their own switching capability." Hence, we affirm in its entirety the *Bureau Liability Order* granting the Complaint, and find that Network is liable for payment of dial-around compensation to APCC.[26]

B. The Bureau Did Not Commit Error in Deferring its Ruling on Two Motions.

7. As permitted by our rules,[27] APCC "bifurcated" its claims, asking for a ruling on liability issues first and, then, if liability were found, a subsequent ruling on the amount of damages owed.[28] During this liability phase of the proceeding, the Bureau decided to defer until the damages phase (if any) ruling on two motions filed by APCC.[29] These two motions

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[25] *Bureau Liability Order*, 20 FCC Rcd at 2083-84, ¶¶ 22-23.

[26] As it did below, Network makes some cursory arguments about how the Commission has previously recognized that certain novel arrangements for conveying assets have been deemed to convey possessory interests. Reply at 5. We agree with the Bureau that there is no material resemblance between Network's agreements with the Debit Card Providers and the arrangements listed in Network's Reply. *See Bureau Liability Order*, 20 FCC Rcd at 10-11, ¶ 21.

[27] 47 C.F.R. § 1.722(d).

[28] Complaint at 24. APCC has now filed a supplemental complaint for damages. Supplemental Complaint for Damages, File No. EB-003-MD-011 (filed April 4, 2005) ("Supplemental Complaint").

[29] *APCC v. NetworkIP, LLC*, Letter from Radhika Karmarkar, FCC, to Counsel, File No. EB-03-MD-011 (rel. July 8, 200[3]); *APCC v. NetworkIP, LLC*, Letter from Radhika Karmarkar, FCC, to Counsel, File No. EB-03-MD-011 (rel. June 13, 2003).

essentially concern whether the statute of limitations reduces the amount of damages for which Network is potentially liable.[30]

8. Network asserts that the Bureau's deferral constitutes prejudicial error, because APCC's motions are obviously meritless, and "it is not practical to conduct an investigation until the parties know the relevant time period in dispute."[31] Network states that the Commission should, therefore, rule now that the statute of limitations reduces the scope of APCC's potential damages.[32]

9. We disagree. In complaint proceedings bifurcated into liability and damages phases, the Commission has provided Bureau staff with discretion to determine which issues should be reached in which phase in order to manage the matter in the most efficient and fair manner.[33] Encompassed within that discretion is the determination whether a statute of limitations issue should be reached in the liability phase or the damages phase, especially where, as here, the defendant concedes that a material portion of the alleged damages accrued within the

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[30] The first motion seeks waiver of the "relation back" deadline in 47 C.F.R. § 1.718, Complainants' Motion for Partial Waiver of Section 1.718 of the Commission's Rules, File No. EB-003-MD-011 (filed June 3, 2003); and the second motion seeks permission to file a reply regarding Network's response to the first motion. Complainants' Conditional Motion for Leave to File Reply, File No. EB-003-MD-011 (filed June 17, 2003).

[31] Application at 5-6. *See id.* at 4, 8-9.

[32] Application at 4-10. We note that, in the damages phase of the proceeding, the Enforcement Bureau did rule on the two motions at issue here. *APCC v. NetworkIP, LLC*, Order, 20 FCC Rcd 16727 (Enf. Bur. 2005).

[33] *See, e.g., Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22501, ¶ 5, 22511, ¶ 30, 22539, ¶ 95, 22549, ¶ 116, 22558-22559, ¶¶ 143-44, 22575, ¶ 178, 22581, ¶ 194 (1997) (describing the broad discretion that the Commission delegated to staff to structure complaint proceedings) (subsequent history omitted).

limitations period.[34] Indeed, Network itself seems to acknowledge that the statute of limitations issue here pertains more to the "investigation of damages" than to the investigation of liability.[35] Accordingly, we conclude that it was reasonable and not prejudicial for the Bureau to defer ruling on APCC's motions in the liability phase of this proceeding. Consequently, we deny Network's Application for Review on this ground.

C. Network's Failure to Pay Dial-Around Compensation Constitutes an Unjust and Unreasonable Practice in Violation of Section 201(b) of the Act.

10. As stated above, the *Bureau Liability Order* held that Network's failure to pay dial-around compensation constitutes a violation of section 201(b) of the Act, which prohibits a common carrier from engaging in any "practice[ ] ... in connection with ... communication service ...that is unjust and unreasonable."[36] Put differently, the *Bureau Liability Order* held that Network's failure to pay payphone compensation as required by rule 64.1300 is an unjust and unreasonable practice in connection with communication service within the meaning of section 201(b) of the Act.

11. After the release of the *Bureau Liability Order*, federal courts have differed about whether the Commission has sufficiently ruled that a violation of its payphone compensation rules constitutes a violation of section 201(b) of the Act, such that a payphone service provider has a private cause of action under the Act to recover unpaid payphone compensation.[37] In

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[34] *See generally AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 23898, 23915 at ¶ 45 (2005) (deferring to the damages phase the question of the extent to which the statute of limitations affected the amount of recoverable damages).

[35] *See* Application at 5-6.

[36] 47 U.S.C. § 201(b).

[37] *Compare APCC Services, Inc. v. Sprint Comm. Co.*, 418 F.3d 1238 (D.C.

light of this split of authority, we take this opportunity to reaffirm and amplify what the Commission has concluded twice before: that "failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment ... , constitutes ... an unjust and unreasonable practice in violation of section 201(b) of the Act."[38] This interpretation rests on the plain language of section 201(b) and on the crucial importance of ensuring fair compensation for payphone service providers.

12. The question presented is: whether a failure to pay payphone compensation in accordance with the Commission's rules is, within the meaning of section 201(b), a (i) "practice in connection with" (ii) "communication service" (iii) that is "unjust and unreasonable."[39] We answer in the affirmative, for the following reasons.[40]

Cir. 2005) ("*APCC v. Sprint*") (holding that the Commission has not yet made a "clear statement (and analysis)" that a violation of its payphone compensation rules constitutes a violation of section 201(b) of the Act), *with Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir. 2005), *cert granted*, 126 S.Ct. 1329 (2006) ("*Metrophones v. Global Crossing*") (holding that the Commission has already made a "fair and considered judgment" that a violation of its payphone compensation rules constitutes a violation of section 201(b) of the Act); *Flying J, Inc .v. Sprint Communications Co.*, 2006 WL 18603 (D. Utah Jan. 4, 2006) (same as *Metrophones v. Global Crossing*); *APCC v. Sprint*, 418 F.3d at 1253-1255 (dissenting opinion of Chief Judge Ginsburg) (same as *Metrophones v. Global Crossing*).

[38] *In the Matter of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of* 1996, Report and Order, 18 FCC Rcd 19975, 19990, ¶32 (2003) ("*2003 Report and Order*"), *aff'd*, Order on Reconsideration, 19 FCC Rcd 21457, 21459 n.17 (2004) ("*2004 Recon Order*"). As Chief Judge Ginsburg observed in dissent in *APCC v. Sprint*, "[t]he court can say '[t]here was no authoritative interpretation of § 201(b) in this case' only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position." *APCC v. Sprint*, 423 F.3d at 1254.

[39] 47 U.S.C. § 201(b).

[40] *See Metrophones v. Global Crossing*, 423 F.3d at 1067-1070 (finding that

13. First, the "communication service" referenced in section 201(b) plainly includes the "communication by wire" referenced in section 201(a).[41] The Act defines "communication by wire" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission...."[42] When a carrier receives and transports payphone calls, it engages in the transmission of sounds by aid of wire between the points of origin and reception of such calls. Accordingly, when a carrier receives and transports payphone calls, it engages in "communication service" within the meaning of section 201(b).[43]

14. Second, a carrier's obligation to pay payphone compensation under our rules arises solely from its receipt and

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a failure to pay payphone compensation in accordance with the Commission's rules is, within the meaning of section 201(b), a practice in connection with communication service that is unjust and unreasonable, for the reasons we explain below); *APCC v. Sprint*, 418 F.3d at 1254-1255 (dissenting opinion) (same).

[41] 47 U.S.C. §§ 201(a), (b).

[42] 47 U.S.C. § 153(51).

[43] In various contexts, the Commission has treated payphone service as a communications service. *See, e.g., In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21340-41, ¶ 244 (1996) (stating that "all payphones serve the public interest by providing access to basic communications services") (subsequent history omitted); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997 (1997) (discussing tariffing requirement for basic payphone services provided by the Bell Companies); *In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, 15644, ¶ 20 (2004) (finding "payphone services are particularly critical to those with few other communications service options"); *see also APCC v. Sprint*, 418 F.3d at 1254-1255 (dissenting opinion).

transport of a payphone call. It follows that a carrier's failure to fulfill that obligation is a "practice in connection with" its communication service of transmitting the call.[44]

15. Third, a carrier's failure to pay payphone compensation rises to the level of being "unjust and unreasonable." This misconduct achieves such "magnitude,"[45] for at least two reasons. First, a failure to pay payphone compensation is not a tariff or contract violation, but a direct violation of Commission rules.[46] Second, a carrier's failure to pay payphone compensation in accordance with the Commission's rules undermines the attainment of an express Congressional goal – to "promote the widespread deployment of payphone services to the benefit of the general public...."[47] Specifically, to help achieve the goal

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[44] *See Metrophones v. Global Crossing*, 423 F.3d at 1067-1070; *APCC v. Sprint*, 418 F.3d at 1254-1255 (dissenting opinion).

[45] *APCC v. Sprint*, 418 F.3d at 1248 (noting that, in a 1999 order, the Commission did not specify that a failure to pay payphone compensation reached the "magnitude" of an unjust and unreasonable act).

[46] The fact that a failure to pay payphone compensation directly violates Commission rules specifically requiring such payment distinguishes this situation from other situations where the Commission has repeatedly declined to entertain "collection actions." *See, e.g., U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, ¶¶ 8-10 (2004) ("*Telepacific v. Tel-America Order*"). Specifically, whereas the payphone compensation rules directly impose payment duties on the payor, the rules and statutory provisions regarding the charges at issue in other kinds of "collection actions" impose duties only on the payee (*i.e.*, duties to impose charges in a certain manner and/or in a certain amount) and not on the payor. *See, e.g., Telepacific v. Tel-America Order*, 19 FCC Rcd at 24556, n.28. Thus, the failure to pay in the latter situation does not contravene the Act or our rules, though it may be unlawful on other grounds and thus actionable in court. *See, e.g., TelePacific v. Tel-America Order*, 19 FCC Rcd at 24555-56, ¶¶ 8-10.

[47] 47 U.S.C. § 276(b)(1). The Commission recently explained some of the reasons why Congress believed it important to promote the widespread deployment of payphones: "We acknowledge, as did Congress in passing section 276, that payphones ... provide a unique back-up communications option when subscription services – whether wireline or wireless – are

of widespread deployment of payphones, Congress directed the Commission to adopt swiftly rules to ensure that "all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone...."[48] Thus, Congress viewed our payphone compensation rules – and, *ergo*, carriers' compliance with those rules – as crucial to the statutory scheme. As the Commission has explained:

> "[S]ection 276 makes it our responsibility to ensure that inadequate compensation does not cause deployment to drop to levels insufficient to serve the public interest.... The purpose of that rate prescription [in our payphone compensation rules] is ... to support, to the extent possible, a functioning market and promote payphone deployment by ensuring that dial-around calls bear an appropriate share of the costs of operating payphones."[49]

In other words, a carrier's failure to pay payphone compensation in accordance with our rules reduces payphone revenues, which, in turn, can ultimately facilitate a reduction in the deployment of payphones. Consequently, a carrier's failure to pay payphone compensation in accordance with our rules strikes at the heart of Congress' design for implementing an important statutory

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unaffordable or unavailable. Payphone services are particularly critical to those with few other communications service options – including low-income customers, the elderly, and residents of rural areas. Payphones also enhance access to emergency (public health and safety) services." *In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls From Payphones*, Report and Order, 19 FCC Rcd 15636, 15644 at ¶ 20 (2004) ("*Compensation Rate Order*") (footnotes omitted).

[48] 47 U.S.C. § 276(b)(1)(A).

[49] *Compensation Rate Order*, 19 FCC Rcd at 15644-15645, ¶¶ 21, 25. *Id.* at 15645, ¶ 24 (noting the connection between payment of the dial-around compensation rate under our rules and the level of payphone deployment).

objective.[50] Such misconduct clearly amounts to unjust and unreasonable action.[51]

16. Accordingly, we reiterate here what the Commission has previously stated both expressly[52] and implicitly:[53] failure to pay in accordance with the Commission's payphone compensation rules constitutes an unjust and unreasonable practice in violation of section 201(b) of the Act.

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[50] *See generally Compensation Rate Order*, 19 FCC Rcd at 15644-, ¶¶ 21 ("[D]eclining [payphone] deployment is causing inconvenience to consumers and may even be starting to pose a public safety issue. The public, community organizations, and government officials view the decline in deployment as a negative development.") (footnotes omitted).

[51] *See Metrophones v. Global Crossing*, 423 F.3d at 1067-1070; *APCC v. Sprint*, 418 F.3d at 1254-1255 (dissenting opinion). *See generally Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (stating that a private cause of action lies for violation of an agency regulation that authoritatively interprets a statutory provision within the agency's delegated authority). We note that there is no basis for limiting the scope of section 201(b) to violations only of Commission rules promulgated pursuant to section 205 of the Act, 47 U.S.C. § 205. *See, e.g., Metrophones v. Global Crossing*, 423 F.3d at 1067-1070 (and Commission orders cited therein); *APCC v. Sprint*, 418 F.3d at 1254-55 (and Commission orders cited therein) (dissenting opinion).

[52] *2003 Report and Order*, 18 FCC Rcd at 19990, ¶ 32; *2004 Recon Order*, 19 FCC Rcd at 21459 n.17.

[53] *See, e.g., In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 22648 at ¶ 232 (1999) (citing section 201as authority for promulgating payphone compensation rules) (subsequent history omitted); *Bell Atlantic-Delaware, Inc. v. Frontier and Bell Atlantic-Delaware, Inc. v. MCI Telecom. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 8112 (2001) (granting two complaints for damages for failure to pay dial-around compensation). *See also APCC Services, Inc. v. TS Interactive, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 10456 (Enf. Bur. 2004) (granting complaint for damages for failure to pay dial-around compensation); *Illinois Bell Tel. Co. v. One Call Communications, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16697 (Enf. Bur. 2001) (granting complaint for damages for failure to pay dial-around compensation).

* * * * * * * * * * * * *

17. In sum, we agree with the Bureau that, because Network has a possessory interest in switches used to route the payphone calls at issue, Network is a facilities-based carrier whose failure to pay dial-around compensation to APCC constitutes a violation of section 64.1300 of our rules, and thus section 201(b) of the Act.[54] Moreover, we disagree with Network that the Bureau committed error by failing to address immediately two motions related to Network's statute of limitations defense. Consequently, we deny Network's application for review and affirm the *Bureau Liability Order*.

IV. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, and 276, and sections 1.115, 1.720-1.736, and 64.1300 of the Commission's rules, 47 C.F.R. §§ 1.115, 1.720-1.736, and 64.1300, that Network's Application for Review IS DENIED, APCC's motion to strike IS DISMISSED as moot, and the *Bureau Liability Order* IS AFFIRMED to the extent described herein.

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[54] Because our finding of a violation of section 201(b) of the Act will afford APCC all of the relief to which it would be entitled upon a finding of a violation of section 276 of the Act, we need not and do not reach the Bureau's conclusion that Network's conduct violated section 276 as well as section 201(b). *See generally APCC v. Sprint, supra; Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003) (both decisions holding that section 276 does not establish a private cause of action to recover payphone compensation).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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No. 05-705

IN THE
Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

It is for Congress, and just for Congress, not only to create federal causes of action but also to specify their scope. In sections 206 and 207 of the Communications Act, 47 U.S.C. §§ 206, 207, Congress expressly limited private causes of action to those alleging violations of the Act's *statutory* provisions. Unlike numerous other private-cause-of-action provisions – both inside and outside the Communications Act – Congress declined to provide for the judicial enforcement of regulations. Respondent nevertheless insists on a right to bring an action alleging violations of duties "the Federal Communications Commission (FCC) has lawfully imposed on common carriers, *by regulation*." Resp. Br. 1 (emphasis added). It claims the right to do so based on its assertion that failing to abide by a regulation is necessarily "unjust and unreasonable" in violation of subsection (b) of the Communications Act's organic statute, 47 U.S.C. § 201.

Accepting Respondent's argument would obliterate the commonsense distinction between statutes and regulations, and thus would permit plaintiffs to bring federal damages lawsuits that Congress has neither allowed nor envisioned. While this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), held that enforcing regulations that merely "apply[]" or "construe" a statute is no different than enforcing the statute itself, that rule does not extend to regulations that implement an open-ended statutory directive to create a regulatory regime. *Id.* at 284-85, 293 n.8. The FCC's payphone compensation regulations plainly fall into the latter category. They impose monetary obligations on Petitioner that would not otherwise exist. Accordingly, the only way to respect Congress' choice to limit federal lawsuits brought under sections 206 and 207 to those arising from violations of the statutory scheme itself is to

hold that section 201(b) does not automatically transform every regulatory violation into a statutory violation.

ARGUMENT

A. The Payphone Compensation Regulations Are Not Enforceable Through The Communications Act's Private Cause Of Action Provision To The Extent That They Create Obligations That The Act Itself Does Not Impose.

Despite the straw man Respondent props up to open its argument (Resp. Br. 16; *see also* U.S. Br. 10), Petitioner is fully aware that this is not an implied-right-of-action case. *See, e.g.*, Petr. Br. 9, 13. Congress has provided in sections 206 and 207 of the Act that violations of "this chapter" are enforceable in federal damages suits.

But the mere existence of an express cause of action for statutory violations does not – as Respondent and the FCC would have it – render *Alexander v. Sandoval* inapplicable and make this simply a run-of-the-mill *Chevron* case. The plain text of sections 206 and 207 limits causes of action to claims asserting violations of the Act itself. Those provisions thus stand in stark contrast to provisions elsewhere in the Act and in numerous other statutory schemes that allow private parties to bring federal damages lawsuits for violations of statutes "or regulations." *See* Petr. Br. 12-15 (collecting examples). There must be some meaningful difference between these two types of provisions; it is a fundamental canon of statutory interpretation that when Congress uses different phrases in similar contexts, those phrases have different meanings. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:06, at 194 (6th ed. 2000). And the statutory term "or regulations" should not be treated as surplusage. *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (surplusage canon).

As several federal courts of appeals already have recognized, there is a straightforward way to make sense of the difference between cause-of-action provisions that allow private enforcement only of statutory violations and those that allow private enforcement of statutory *or regulatory* violations: The former limit actions to those asserting violations of express statutory provisions in the same way that *Sandoval* limits actions in the implied-cause-of-action context, whereas the latter are not subject to a *Sandoval*-equivalent restriction. *See Iverson v. City of Boston*, 452 F.3d 94, 99-101 (1st Cir. 2006); *Ability Ctr. v. City of Sandusky*, 385 F.3d 901, 913-15 (6th Cir. 2004).[1] Indeed, the impermissibility of basing a cause of action on a mere regulatory prohibition – or, *a fortiori*, any other agency proclamation that goes beyond an express statutory prohibition – is even clearer here than it was in *Sandoval* itself. In contrast to the judicial guesswork that the implied cause of action there required, Congress has *expressly* dictated in sections 206 and 207 that a cause of action exists only for statutory violations. *See* Petr. Br. 19.

In short, this case does not turn on the *Chevron* question whether the FCC's payphone compensation regulations – or, much less, its pronouncement that violations of the regulations violate section 201(b) – is authoritative and reasonable. *See* Resp. Br. 17; U.S. Br. at i. That inquiry would merely test the

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[1] Following *Sandoval*, every court of appeals to address the issue also has held that the private cause of action contained in 42 U.S.C. § 1983, which provides for the private enforcement of the "laws" of the United States, does not allow damages lawsuits to enforce mere regulations. *See Johnson v. City of Detroit*, 446 F.3d 614, 628-29 (6th Cir. 2006); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 943 (9th Cir. 2003); *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Protection*, 274 F.3d 771, 790 (3d Cir. 2001). These decisions go even farther than this Court needs to go here because there is potential ambiguity in the word "laws" that is not present in Congress' express limitation in sections 206 and 207 to statutory violations. There can be no doubt, however, that accepting Respondent's argument that the mere existence of an express cause of action renders *Sandoval* inapplicable would abrogate those holdings respecting § 1983 as well.

legality of the regulations or the *2003 Payphone Order*'s proffered use of section 201(b). In order to assess whether a private cause of action exists to seek damages in federal court based on violations of the FCC's regulations, the question, as the First Circuit has put it in the context of an analogous cause-of-action controversy, is the same as in *Sandoval*: whether the agency pronouncements "simply effectuate[] an express mandate contained in the organic statute" or whether they "announce[] an obligation or a prohibition not imposed by the organic statute." *Iverson*, 452 F.3d at 101 (citing *Sandoval*, 532 U.S. at 284-85); *see also* Petr. Br. 20-21. If they do the latter, they may not be privately enforced through sections 206 and 207's cause of action to claim damages based on *statutory* violations.

B. Section 201(b) Does Not Require A Long Distance Carrier To Compensate Payphone Service Providers For Dial-Around Calls As Directed By The FCC's Regulations.

Once this case is returned to its proper framework, the outcome is clear: Violations of the payphone compensation regulations cannot give rise to a private cause of action because those regulations create obligations that section 201(b) does not impose itself. And nothing about the FCC's pronouncement in the *2003 Payphone Order* that violations of the regulations also violate section 201(b) can alter that reality.

1. Respondent virtually concedes that it cannot prevail on its section 201(b) claim in a *Sandoval*-equivalent regime when it acknowledges that "nothing in the statutory language requires th[e] approach" embodied in the FCC's payphone compensation regime (Resp. Br. 21), and emphasizes over and over that the FCC has "imposed on common carriers, *by regulation*, the obligation to pay PSPs for the 'dial-around' calls at issue in this case." *Id.* at 1 (emphasis added); *see also id.* at 7, 11, 14, 15, 41. And not just by any regulations – by

regulations imposed pursuant to a *different* section of the Act: section 276. Put another way, the only reason long distance carriers have to pay payphone service providers with respect to dial-around calls – and pay a particular amount, at that – is because *the FCC* – acting pursuant to a different statute than Respondent invokes here – has decreed that long distance carriers should have to do so. Absolutely nothing in section 201(b) itself requires such payments.

Respondent nevertheless complains that it is inherently unfair for long distance carriers to fail to pay their "debts" to payphone service providers. Resp. Br. 14, 39. But what is fatal to Respondent's position is that absent the FCC's *regulatory* construct under which long distance carriers are supposed to pay payphone service providers and then recoup their expenses from the callers, long distance carriers would have *no* alleged debts to payphone service providers in the first place. Payphone service providers' only plausible source of recovery for the service at issue here would be to go directly after *callers*, who are the ones that have availed themselves of access to payphone services without payment.[2]

The FCC raises two other objections to this straightforward analysis. First, it argues that the analysis would render section 201(b) "an essentially useless irrelevancy" because it would require the specific practice at issue to be expressly mentioned in that section, and the section's general prohibition does not expressly mention any practices. U.S. Br. at 22-24. But this

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[2] The FCC suggests at one point that long distance carriers might owe money to payphone service providers in the context of coinless calls even in the absence of the payphone compensation regulations because carriers "could" pay a commission to payphone service providers with respect to such calls. U.S. Br. 29. But Respondent does not claim any such entitlement; just because long distance carriers might choose to pay commissions with respect to coinless calls does not mean it would be unjust or unreasonable them not to do so. Indeed, Respondent concedes as much by explaining that "the PSP . . . provides a service to *the caller*, for which [it] is supposed to be compensated." Resp. Br. 21 (emphasis added).

argument mischaracterizes Petitioner's position. The problem here with portraying violations of the payphone compensation regulations as violations of section 201(b) is not simply that section 201(b) fails to mention payphone compensation; it is that another section (276) expressly does – in great detail. And that section conspicuously declines to impose the obligation that Respondent seeks to enforce here. *See* Petr. Br. 22-26. Where no more specific section of the Act covers the practice at issue – for example, in the context of "charging customers for rejected collect calls," U.S. Br. 24 – and where the "practice" at issue otherwise comes within the ambit of section 201(b), that section may well give rise to a private cause of action.

The truth of the matter is not that Petitioner's position would render section 201(b) a "useless irrelevancy" but rather that Respondent's and the FCC's position would, as the D.C. Circuit has recognized, "convert[] any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court." *APCC Servs. Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1247 (D.C. Cir. 2005) (per curiam), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766). Respondent does not deny this fact. Rather, it says that Petitioner's alleged failures to pay it violate section 201(b) because payphone service providers' ability to recover compensation for coinless calls "is integral to the proper functioning of the payphone regulatory regime." Resp. Br. 11. This is pure bootstrapping. If violating a regulation that is "integral to the proper functioning of a regulatory regime" violates section 201(b), then a common carrier's violation of *any* regulation transgresses section 201(b). Presumably all of the FCC's regulations are integral to the proper functioning of a regulatory regime; that is why the FCC enacted them.

Second, while Respondent acknowledges that "[r]egulation of dial-around services could *just as easily* have developed in a

manner that allowed PSPs to collect money" directly from callers (Resp. Br. 21 (emphasis added)), the FCC takes a different tack, arguing that the Act itself actually "is most reasonably understood to suggest" that long distance carriers should be the ones to pay payphone service providers for coinless calls because section 226 prohibits requiring consumers to pay for such calls. U.S. Br. 22; *see also id.* at 15. As an initial matter, however, "suggest[ing]" a certain obligation is not the same as expressly mandating it, which is what is required to give rise to a private cause of action. *See, supra*, pp. 2-4.

But even putting that problem aside, the FCC's reading of section 226 – which it has never before advanced in any forum – is incorrect. All that section prohibits is requiring "*advance* payment by customers." 47 U.S.C. § 226(e)(2) (emphasis added). As the FCC previously recognized, this limited prohibition hardly precludes a "caller pays" approach. The FCC remains free to adopt – and actually considered adopting – a "third party billing" approach, under which long distance carriers would bill customers after-the-fact on behalf of payphone service providers. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20,541, 20,580-81 ¶¶ 77, 79 (1996) (considering "'set use fee' system, where the toll-carrier would bill and collect from the end user and then remit payment to the PSP"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 F.C.C.R. 21,233, 21,272 ¶ 79, 21,275 ¶ 88 (1996) (same). The FCC also could have adopted a plan requiring callers to bill the cost of payphone access for coinless calls to their home phone, a credit card, or other later-billing device. *See* 1996 Report and Order, *supra*, at 20,582-83 ¶ 80 (considering "'caller pays' compensation system" by "billing the charge to a credit card or calling card").

There simply is no escaping that the FCC, not Congress, imposed the duties Respondent seeks to enforce here. This fact dooms Respondent's attempt to bring this cause of action in federal court.

2. Even if all the FCC's pronouncements could be incorporated into this Court's section 201(b) analysis, and all those pronouncements had to do for Respondent's private cause of action to be valid was pass the *Chevron* authoritativeness and reasonableness test, Respondent's claim would still fail. Although Respondent strains mightily to show that the FCC's statement in the *2003 Payphone Order* that payphone service providers may seek damages in federal court for violations of the payphone compensation regulations (a) is eligible for deference and (b) a reasonable construction of 201(b), Respondent falters on both counts.

a. Respondent contends that the FCC's pronouncement that its regulations are enforceable through a private cause of action does not run afoul of this Court's decision in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), because (i) "Congress, not the FCC, created the express right of action" at issue here and (ii) the FCC's pronouncement was really a substantive construction of section 201(b) that did nothing more than have "implications" for that right of action. Resp. Br. 30-31; *accord* U.S. Br. 19-20. But Respondent's first point does nothing to distinguish this case from *Adams Fruit*. There, just as here, Congress had expressly provided the underlying right of action at issue. *Adams Fruit*, 494 U.S. at 641.

Respondent's second point simply flouts reality. As Respondent itself notes, the FCC's focus in the *2003 Payphone Order* was "whether PSPs have access to *adequate avenues of relief* in instances where [its] PSP compensation rules are violated." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed

Rulemaking, 18 F.C.C.R. 11,003, 11,012 ¶19 (2003) (emphasis added); *see* Resp. Br. 13 ("The *2003 Payphone Order* resulted from a notice-and-comment rulemaking that focused on whether PSPs have adequate means to collect compensation from IXCs."); U.S. Br. 20 (FCC's statement in the *2003 Payphone Order* reflected effort "to ensure that PSPs are able to collect the money they are owed"). In other words, the FCC was opining on remedies, not rights. And, it opined, contrary to the language of sections 206 and 207, that violations of regulations could give rise to damages actions in federal court.

While the FCC is perfectly free to consider the availability of payphone service providers' remedies in administering its regulatory regime, *Adams Fruit* provides that it is "inappropriate" to defer to an agency concerning the extent of a "judicially enforceable remedy." 494 U.S. at 650; *see also Kelley v. Environmental Protection Agency*, 15 F.3d 1100, 1107-08 (D.C. Cir. 1994). And despite Respondent's suggestions to the contrary (Resp Br. 5, 6-7), it should go without saying that the same principle applies with respect to certain long distance carriers' submissions in past proceedings on that point. *See, e.g., Roberts v. Galen of Va.*, 525 U.S. 249, 253 (1999) (per curiam) ("the concession of a point on appeal by [a party] is by no means dispositive of a legal issue"). Indeed, while the D.C. Circuit initially accepted in passing those long distance carriers' submissions that a cause of action to enforce the payphone compensation regulations existed under sections 206 and 207, *American Pub. Communications Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000), that court itself disavowed that legal proposition upon closer examination by holding in *APCC Services* that no such cause of action existed, 418 F.3d at 1247-48.

Even if Respondent could overcome *Adams Fruit*, its attempt to show that the FCC engaged in sufficient deliberation and explanation with respect to whether violations of the payphone

regulations violate section 201(b) would fail for a related reason. If the *2003 Payphone Order* had truly construed section 201(b), one would expect to find at least something substantively discussing why a long distance carrier not paying money to a payphone service provider for coinless calls is a "practice" that is "unjust and unreasonable." But one finds not one such word.[3] The FCC, to be sure, engaged in extensive deliberation concerning whether payphone service providers had remedial avenues to enforce the payphone compensation regulations. But it gave no notice and provided no explanation respecting whether or why violating these regulations violates section 201(b). That, of course, is what the D.C. Circuit meant when it stated – in a passage Respondent unjustly mocks (Br. 28 n.10) – that "the Commission did not attempt . . . to

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[3] Nor is there any such word in the FCC's orders following the Telephone Operator Consumer Services Improvement Act of 1990, codified at 47 U.S.C. § 226. Contrary to Respondent's suggestion (Br. 2-3), the FCC there did not rely on the portion of section 201(b) that proscribes "unjust and unreasonable" practices to require compensation for some coinless calls. Rather, the FCC simply cited section 201 – not any specific subpart or language of section 201 – in the "Ordering Clauses" section among a host of other statutes:

> Accordingly, IT IS ORDERED, that pursuant to authority contained in Sections 1, 4, 201-205, 218, 220, and 226 of the Communications Act of 1934, . . . that the policies, rules, and requirements set forth herein ARE ADOPTED.

Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 F.C.C.R. 3251, 3261 ¶ 66 (1992); *see also Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 F.C.C.R. 4736, 4749 ¶ 59 (1991) (same). The FCC undoubtedly cited section 201 for the proposition that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," 47 U.S.C. § 201(b) – not in reference to that section's "unjust and unreasonable" language.

interpret § 201(b) to encompass violations of its [payphone compensation] rules." *APCC Servs.*, 418 F.3d at 1248.

Respondent tries to avoid this problem by objecting that (i) an agency's failure to provide reasoning for its decision does not preclude *Chevron* deference outside of direct review of agency action; and (ii) the FCC's *amicus* briefing is itself entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). Resp. Br. 35-38. But neither of these arguments withstands scrutiny. First, there can be no doubt that the *ipse dixit* nature of an agency's assertion is relevant whenever a question respecting *Chevron* deference arises. Just last Term, this Court confirmed in a context much like this one – that is, in a private lawsuit that did not seek direct review of federal agency action – that "expressions of agency understandings" that do not "set out agency reasoning . . . do not command deference." *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843, 1848 (2006).

Second, *Auer* simply cannot bear the weight Respondent places on it. In two later-decided cases, this Court has refused to defer to an agency explanation advanced in a brief, *United States v. Mead Corp.*, 533 U.S. 218, 228 n.19 (2001), and held unequivocally that agency assertions that lack "the force of law" – as briefs do – "do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). As Judge Posner has noted, "[p]robably there is little left of *Auer*." *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003). But even if *Auer* were still good law, it would not help Respondent, for this Court gave credence to the agency's brief there only after emphasizing that the agency's position "is in no sense a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack." 519 U.S. at 912 (citation and alteration omitted); *see also America's Community Bankers v. FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000) ("In whatever context we defer to agencies, we do so with the understanding that the object of our deference is the

result of agency decision-making, and not some *post hoc* rationale developed as part of a litigation strategy.") (quotation marks omitted). That is exactly what we have here. Before appearing in this case and in the similar case in the D.C. Circuit, the FCC never offered any rationale as to why violating its payphone compensation regulations might constitute an unjust or unreasonable communications practice within the meaning of section 201(b). Consequently, it may not do so now.

b. Even if the FCC's assertion that violations of the payphone compensation regulations violate section 201(b) were eligible for deference, Respondent's argument that the FCC's assertion is "eminently reasonable" (Resp. Br. 38) would be unpersuasive. The most glaring deficiency in Respondent's argument is its inability to explain why it is reasonable to conclude that section 201(b), which is expressly limited to "interstate" and international communications, would cover communications that sometimes are wholly intrastate in nature.[4]

Respondent suggests that after some elaborate fact finding procedure it might be able to show that it is not feasible to separate interstate from intrastate coinless calls. Resp. Br. 24-27. But that suggestion is beside the point. The relevance of

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[4] Respondent's assertion (Br. 23-24) that this Court should ignore this argument because it was not specifically mentioned below is specious. "'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). *Accord Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); STERN ET AL., SUPREME COURT PRACTICE 421 (8th ed. 2002). Petitioner's jurisdictional mismatch point is not a new claim; rather, it simply supports Petitioner's argument that violating the payphone regulations does not constitute a violation of section 201(b).

section 276(b)(1)'s direction to ensure compensation for "intrastate" calls – with no concomitant legislation addressing the jurisdictional limitation in section 201(b) – shows that Congress simply did not anticipate that violations of the FCC's ensuing regulations would be an unjust or unreasonable communications practice.[5]

Both Respondent and the FCC try to salvage their positions by asserting that the "solution" to the jurisdictional mismatch problem is "to limit the reach of the Section 206 damages action based on Section 201(b) to interstate calls only." Resp. Br. 27; *accord* U.S. Br. 30 n.8. But this would be the height of arbitrariness. There is no reason why failing to pay with respect to interstate calls should give rise to a federal damages action but that failing to pay with respect to intrastate calls should not. The way to avoid this absurd result – as this Court should strive to do, *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) – is to recognize that failing to abide by the FCC's regulatory regime simply does not amount to an unjust or unreasonable practice.

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[5] Respondent's legal position underpinning its feasibility argument is, in any event, wrong. The FCC has never extended federal authority over jurisdictionally mixed communications involving more than a *de minimis* interstate component to "switched" calls like the ones at issue here. This is because one can determine whether "switched" calls are inter or intra state simply by looking at the origin of the call and the phone number dialed. *See, e.g., Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, FCC 06-79, ¶ 32 (June 30, 2006) (endorsing direct calculations or percentage of interstate use reporting to allocate traffic between interstate and intrastate jurisdictions); *The Time Machine, Inc.*, Memorandum Opinion and Order, 11 F.C.C.R. 1186, 1190-91 ¶¶ 29-31, 1192 ¶ 38 (1995) (recognizing ability to allocate calling card (*i.e.*, switched) traffic between inter and intrastate jurisdictions). Contrary to Respondent's suggestion (Br. 26) that Global Crossing stated otherwise in administrative proceedings, Global Crossing's comments explained the difficulty in determining *whether* certain calls are completed, not *where* a caller is calling – *e.g.*, inter or intra state. Comments of Global Crossing North America, Inc., *Implementation of the Pay Telephone Reclassification and Compensation Provisions*, CC Docket No. 96-128, at 2-8 (June 23, 2003).

Respondent also fails to persuade in arguing (Br. 18-22) that a long distance carrier's failure to pay a payphone service provider with respect to coinless calls may reasonably be considered a communications "practice" within the meaning of section 201(b). Respondent does not dispute that the Ninth Circuit was wrong in asserting that requiring a long distance carrier to pay a payphone service provider with respect to coinless calls relates to carrier-customer relationships – that is, to "furnish[ing] . . . communications service upon reasonable request therefor." 47 U.S.C. § 201(a). Nevertheless, Respondent contends that such payments (or nonpayments) are "practices" covered by section 201(b) for an entirely different reason than the one advanced by the Ninth Circuit: because they relate to the "second" clause of section 201(a) – the clause that deals with carrier-carrier relationships. But the plain text of the second clause belies Respondent's novel argument. That clause is triggered only when the FCC orders carriers to interconnect – in the words of the statute to "establish physical connections with other carriers," "to establish through routes" or "to establish and provide facilities and regulations for operating such routes." 47 U.S.C. § 201(a); *see also In re ITT World Communications Inc. v. Western Union Telegraph Co.*, Memorandum Opinion and Order, 87 F.C.C. 2d 684 ¶ 17 (1981) (citing *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974)) (second clause applies to interconnection orders); PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 280 (2d ed. 1999) (same); 2 HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW 552-53 (1999) (same).[6] None of those things is even plausibly

[6] The legislative history of the second clause confirms that it was meant to addresses the limited – and relatively outdated – problem of carriers refusing to interconnect with other carriers. "The second clause of Section 201(a) was added to the bill in response to a contemporaneous court ruling that had held that the common law duty of common carriers to interconnect was a contractual matter. The clause therefore lists a series of powers that this Commission was to have in that context." *In re Petition of the*

at issue here. The FCC is not directing Petitioner to establish any connections or facilities related to coinless calling. Accordingly, section 201(a)'s second clause does not apply to any of Petitioner's economic practices in that respect either.

Finally, Respondent and the FCC contend that foreclosing section 201(b) as a vessel through which the payphone compensation regulations may be enforced would "significantly inhibit, if not eliminate, the administrative complaint process in many cases" because "judicial and administrative remedies" under sections 206 and 207 are coextensive. U.S. Br. 24-25; *accord* Resp. Br. 7 n.3. This concern is overwrought. As suggested above, parties may bring administrative complaints (or complaints in federal court) under sections 206 and 207 with respect to various practices that are "unjust or unreasonable" on their own terms, independent of any regulatory duties. *See*, *supra*, p. 6. Furthermore, neither Respondent nor the FCC denies that provisions in the Act besides sections 206 and 207 may allow administrative procedures to address violations even of regulations that impose obligations beyond those contained in section 201(b) or any other of the Act's statutory provisions – especially when, as here, the provision giving rise to the regulations directs the FCC "to ensure" those obligations are enforced. 47 U.S.C. § 276(b)(1). *See* Petr. Br. 17-18; U.S. Br. 26 ("such a regime might be permissible").

As Respondent aptly reminds this Court, we are no longer in the "bygone world of Ma Bell"; the telecommunications industry has become extremely competitive and technologically complex. Resp. Br. 21. Litigation in this area can be equally sensitive and intricate. When federal district courts have tried to manage lawsuits like this one, the cases have tied them up in knots – lasting for years on end, and requiring the courts repeatedly to seek administrative

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Continental Telephone Co. of Va. for a Declaratory Ruling, Memorandum Opinion and Order, 4 F.C.C.R. 7737, 7749 ¶ 21 (1988).

assistance. *See* Br. of Sprint Communications Co. as *Amicus Curiae*, at 20-24. Now more than ever, if there is a proper forum in which to resolve disputes over the meaning and application of the Commission's regulations, it is the FCC.

C. Respondent's Claim Based On Section 276 Is Waived And, In Any Event, Lacks Merit.

In its final attempt to sustain the Ninth Circuit's judgment, Respondent advances a proposition that not even that court has been willing to swallow: that section 276 of the Act gives rise to a private cause of action to enforce the FCC's payphone compensation regulations. This claim is not properly before this Court. Even if it were, it would fail on the merits.

1. "In the ordinary course," this Court "[does] not decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 205 (2001); *see also* STERN ET AL., SUPREME COURT PRACTICE 422 (8th ed. 2002). Although Respondent did not press its section 276 claim in the Ninth Circuit, *see* Petr. App. 9a n.4, it contends that it may now raise that claim because (a) it is nothing more than an alternate ground for affirmance, and (b) it is antecedent to the question presented. Resp. Br. 40-42. Neither assertion is correct.

a. Respondent's section 276 claim is not an alternate ground for affirmance; it is *an entirely different cause of action.* Respondent's proposed amended complaint – the subject of this appeal – alleged seven separate causes of action against Petitioner: (1) violations of section 276; (2) violations of section 201(b); (3) violations of section 407; (4) violations of section 416(c); (5) unjust enrichment under state law; (6) implied contract under state law; and (7) negligence under state law. J.A. 53-59. The district court dismissed Respondent's section 276 claim, and Respondent did not appeal that ruling to the Ninth Circuit. Accordingly, under basic rules of civil and appellate procedure, the district court's decision is final and that claim is over. *See, e.g., The Andersons, Inc. v. Consol,*

Inc., 348 F.3d 496, 504 (6th Cir. 2003); *Renda v. King*, 347 F.3d 550, 552 n.2 (3d Cir. 2003); *Fitts v. Federal Nat'l Mortg. Ass'n*, 236 F.3d 1, 3 n.2 (D.C. Cir. 2001). Respondent may no more resuscitate that claim than a plaintiff could renew an abandoned First Amendment claim in a lawsuit under 42 U.S.C. § 1983 that originally alleged violations of several different constitutional provisions.

Even if Respondent had not abandoned its section 276 claim, it would not be appropriate for this Court to address it. Respondent failed to raise the claim in its Brief in Opposition to Global Crossing's Petition for Certiorari. Under this Court's Rule 15.2, therefore, the claim "may be deemed waived." *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (quotation marks omitted); *see also S. Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999) (refusing to consider respondent's argument that was not raised until merits briefing); *Roberts*, 525 U.S. at 253-54 (same). Metrophones' current counsel, when urging this Court to grant certiorari in *APCC Services, petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766), recognized as much. In its reply brief, APCC urged the Court (unsuccessfully) to grant review and consolidate its petition with this case because doing so would give the Court "the opportunity . . . to construe the specific statutory provision (Section 276) in which Congress focused on the problem underlying both cases." Reply Br. in Support of Pet'n for Cert., at 10. The inference that section 276 – as a basis for bringing a cause of action – is not before this Court is even stronger now that the FCC's amicus brief does not address whether section 276 gives rise to any private cause of action.

b. The question whether a violation of the payphone regulations constitutes a violation of section 276, which, in turn, triggers sections 206 and 207, is not antecedent to the question presented here. To the contrary, it is a claim entirely separate from Respondent's section 201(b) claim. When it is

possible to consider the question presented in a case on the merits "without assuming" the answer to the newly-raised issue, the latter is not a predicate to the former. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995). That is the case here. This court need not assume one way or the other whether section 276 gives rise to a private cause of action to seek damages for violations of the payphone compensation regulations to determine whether section 201(b) does so. The only relevant points with respect to section 276 are that it neither creates a freestanding cause of action nor requires any particular kind of compensation regime. *See* Petr. Br. 23. Those two points are self-evident from the face of the statute, and Respondent does not dispute them.

2. In any event, the D.C. and Ninth Circuits have correctly held that violating the payphone compensation regulations does not amount to violating section 276. *See Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-51 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004); *APCC Servs.*, 418 F.3d at 1246. Contrary to Respondent's assertion, the FCC payphone regulations do not "interpret," "apply," or, least of all, "fill in the details" left open in section 276. Resp. Br. 44-46. Rather, the regulations respond to Congress' command to create a self-contained regulatory regime. There is a fundamental difference between giving a contractor detailed building blueprints that permit some discretion – such as choosing paint colors – and simply directing someone to build a house and choose the location. Congress' dictate in section 276 obviously falls into the latter category. The payphone regulations, therefore, are just like the regulations in *Sandoval* that this Court assumed were a legitimate means of implementing a general directive, but could not themselves give rise to a private cause of action.

Respondent protests that "there is no reason to believe" that Congress would not have wanted regulations enacted pursuant to 276 to be enforced through the private cause of action set forth in sections 206 and 207. Resp. Br. 44. But in reality,

there is every reason to believe this. Congress traditionally has *explicitly* provided for judicial enforcement of regulations in the Communications Act and other statutory schemes when it wanted them so enforced. *See* Petr. Br. 13-14. It did not do so in sections 206 or 276. Respondent simply does not come to grips with the language of these sections or its jurisprudential implications.

Nor, contrary to Respondent's additional objection, does declining to find a cause of action through section 276 "curtail PSP's rights found elsewhere in the Act." Resp. Br. 44. To make the point one final time: private plaintiffs have never had any right to begin with under sections 206 and 207 to seek damages in federal court for violations of mere regulations. And nothing in the Act itself has ever required long distance providers to pay payphone service providers with respect to coinless calls. Even though the FCC had the power to impose such an obligation, the Commission's directive went far beyond what any statutory provision required. The obligation thus may be enforced, if at all, only administratively.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's opening brief, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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PETITIONER

v.

METROPHONES TELECOMMUNICATIONS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Federal Communications Commission (FCC) reasonably concluded that a common carrier's failure to pay compensation for dial-around calls made from payphones, as required by FCC rules and orders adopted pursuant to a specific statutory directive, is an "unjust and unreasonable" practice that violates Section 201(b) of the Communications Act of 1934, 47 U.S.C. 201(b).

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In the Supreme Court of the United States

No. 05-705

GLOBAL CROSSING TELECOMMUNICATIONS, INC., PETITIONER

v.

METROPHONES TELECOMMUNICATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Under rules promulgated by the Federal Communications Commission (FCC), an interexchange carrier (IXC) must pay a payphone service provider (PSP) for each completed "dial-around" call made to the IXC's long-distance access lines using the PSP's payphones. This case presents the question whether an IXC's failure to pay compensation to the PSP as required by the Commission's rules is an "unjust or unreasonable" practice in violation of 47 U.S.C. 201(b), and thus is actionable under provisions of the Communications Act that create a cause of action for any violation of the Act. The Commission has determined that an IXC's failure to pay does violate Section 201(b), and the validity of that determination is directly at issue in this case. Moreover, the government has a strong interest in the construction of the Act's substantive and remedial provisions at issue here.

STATEMENT

1. a. In the 1980s, technological developments made it possible for independent PSPs to enter the payphone market, which had historically been limited to local exchange carriers (LECs). *Implementation of the Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996, Notice of Proposed Rulemaking*, 11 F.C.C.R. 6716, 6719-6720 (1996) (*1996 Payphone Notice*). Although payphone service provided by LECs was not a revenue center and, indeed, was partially subsidized by other ratepayers, *id.* at 6718, an independent PSP had two principal sources of revenue: coins deposited by a caller making a local call, and commissions paid by the default long distance carrier selected by the PSP to service its payphones unless the caller took affirmative steps to "dial around" that carrier by entering an access code or an 800 number. *Id.* at 6721, 6728 n.64.

The PSP receives neither type of revenue from coinless, dial-around calls. In order to protect their revenue base, therefore, some PSPs began to block such calls, which led to widespread consumer complaints. *1996 Payphone Notice*, 11 F.C.C.R. at 6721-6722. In response to those complaints, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. 226). That Act prohibits PSPs from blocking dial-around calls, thus ensuring that a caller can use any long distance carrier. 47 U.S.C. 226(c)(1)(B). Congress also directed the FCC to consider the need to prescribe compensation for "calls routed to providers * * * other than the presubscribed provider" of long distance services, so long as it did not prescribe "advance payment by consumers." 47 U.S.C. 226(e)(2). The FCC accordingly instituted a flat-rate, per-phone compensation plan, under which long-distance carriers would pay PSPs in proportion to their share of overall

industry revenue. *Policies & Rules Concerning Operator Serv. Access & Pay Tel. Compensation, Second Report & Order*, 7 F.C.C.R. 3251, 3255-3259 (1992).

b. In the Telecommunications Act of 1996, Pub. L. No. 104-104, § 151, 110 Stat. 106, Congress revised payphone service regulation, directing the Commission to "take all actions necessary" to "discontinue * * * all intrastate and interstate payphone subsidies * * * in favor of a compensation plan" under which "all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. 276(b)(1)(A) and (B). The Commission implemented Section 276 by rulemaking. *Implementation of the Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996*, 11 F.C.C.R. 20,541 (1996) (*1996 Payphone Order*), on reconsideration, 11 F.C.C.R. 21,233 (1996), aff'd in part *sub nom. Illinois Pub. Telecomms. Ass'n* v. *FCC*, 117 F.3d 555 (D.C. Cir. 1997), cert. denied, 523 U.S. 1046 (1998). To assure compensation for coinless calls, the Commission adopted a "carrier pays" system, under which the PSP would be compensated directly by the "primary economic beneficiary" of each call, namely, the IXC that completed the call. *1996 Payphone Order*, 11 F.C.C.R. at 20,584, 20,596.

The payphone rules, including the "carrier pays" approach, were largely affirmed by the court of appeals, but the court struck down some aspects of the regulations, including the per-call rate that was to apply in the absence of an agreement between the PSP and IXC. *Illinois Pub. Telecomms. Ass'n* v. *FCC*, 117 F.3d 555, 563-564 (D.C. Cir. 1997), cert. denied, 523 U.S. 1046 (1998). The Commission then set a per-call default rate that was affirmed in *American Public Communications Council* v. *FCC*, 215 F.3d 51 (D.C. Cir. 2000). In sustaining the rate, the court rejected a claim by PSPs that the Commission erred in failing to include an amount to ac-

count for bad debts, relying in part on the argument that no bad debt component was needed because a "[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages" under 47 U.S.C. 206-208. *American Pub. Comme'ns Council*, 215 F.3d at 56. That argument had been raised by long distance carriers, including petitioner's amici in this Court and Frontier Corporation, a firm that petitioner has since acquired.

Shortly before the court affirmed the per-call rate, PSPs reported that they were often unable to collect the money to which they were entitled when a call was handled by more than one IXC (in that situation, the second IXC is known as a reseller). For calls involving multiple IXCs, the rules at the time put payment responsibility on an IXC that had its own switching equipment, known as a "switch-based reseller." PSPs urged the FCC to place responsibility for payment instead on the first IXC to which a call was delivered. IXCs argued in response that PSPs must "resort to the usual collection remedies against [switch-based resellers] to enforce their rights." Frontier Corp. Cmts. at 4 (filed May 17, 1999). In 2001, the Commission changed the compensation rules to make the first IXC responsible for payment. *Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996, Second Order on Reconsideration*, 16 F.C.C.R. 8098 (2001). The D.C. Circuit reversed that determination on procedural grounds. *Sprint Corp.* v. *FCC*, 315 F.3d 369 (2003).

On remand, the Commission sought comment on which of multiple IXCs involved in a call should be responsible for payment and, *inter alia*, on "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated." *Implementation of the Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996*, 18 F.C.C.R. 11,003, 11,012 ¶ 19 (2003) (*2003 NPRM*). The Commission decided, consistent with the ap-

proach of its earlier rule, that the switch-based reseller for the particular call at issue should be responsible for payment. *Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996*, 18 F.C.C.R. 19,975 (2003) (*2003 Payphone Order*), aff'd on reconsideration, 19 F.C.C.R. 21,457 (2004). To address the payment concerns of PSPs, the Commission required that IXCs report to PSPs all calls directed to switch-based resellers. *Id.* at 19,994. It also ruled that an IXC's "failure to pay * * * constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the [Communications] Act." *Id.* at 19,990 ¶ 32.

2. In 2001, respondent filed suit in the United States District Court for the Western District of Washington against petitioner and other IXCs, alleging a failure to pay the full amount of dial-around compensation due under the FCC's rules, in violation of Section 276. In 2003, however, before the Commission adopted the *2003 Payphone Order*, the Ninth Circuit decided in *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047 (2003), cert. denied, 541 U.S. 988 (2004), that Section 276 did not create a private right of action for PSPs. The district court accordingly dismissed the claim under Section 276, but it allowed respondent to amend its complaint to state a cause of action under 47 U.S.C. 206 and 207, alleging a violation of Section 201(b). Pet. App. 53a. Section 206 makes a common carrier liable for injuries caused by "any act * * * in this chapter * * * declared to be unlawful," and Section 207 grants an express private right of action to recover damages for such injuries in district court. Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. 201(b). The

district court held that the amended complaint stated a claim under Section 207. Pet. App. 51a-53a.

3. The court of appeals affirmed in relevant part. Pet. App. 1a-39a. Relying on the *2003 Payphone Order*, the court held that "[u]nder the FCC's interpretation, the failure to pay compensation * * * is actionable in federal district court pursuant to §§ 206 and 207." *Id.* at 9a. Under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court deferred to the Commission's determination in the *2003 Payphone Order* that a failure to pay compensation was an unjust and unreasonable practice that violated Section 201(b). Pet. App. 9a.

The Ninth Circuit disagreed with an earlier decision of the D.C. Circuit that had held that PSPs did not have a private right of action for failure to pay dial-around compensation. *APCC Servs., Inc.* v. *Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir. 2005), petition for cert. pending, No. 05-766 (filed Dec. 12, 2005). The D.C. Circuit had held that because the FCC in *Implementation of the Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996*, 14 F.C.C.R. 2545 (1999) *(1999 Payphone Order)* "said not a word about § 201(b)," the Commission had never "specified that a carrier's failure to pay was of th[e] magnitude" of an unjust and unreasonable act. 418 F.3d at 1247, 1248. While the court "d[id] not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none," it found that the Commission had not "attempt[ed] to exercise any such power." *Id.* at 1248. In so holding, however, the D.C. Circuit failed to mention the Commission's explicit determination in the *2003 Payphone Order* that failure to pay would constitute a violation of Section 201(b). Indeed, Chief Judge Ginsburg dissented on the ground that the majority reached its result only by ignoring the *2003 Payphone Order*. He "disagree[d] that the Commission has not

exercised its interpretive authority in this case." *Id.* at 1254 (Ginsburg, C.J., dissenting). The Ninth Circuit likewise "disagree[d] with the majority's opinion in [*APCC Services*] and * * * adopt[ed] the position of the dissenting judge." Pet. App. 13a n.5.

SUMMARY OF ARGUMENT

Section 206 of the Communications Act (47 U.S.C. 206) makes carriers liable for any violation of the Act, and Section 207 (47 U.S.C. 207) expressly authorizes parties damaged by such violations to bring suit in federal court. Respondent is thus entitled to bring this action under Section 207 if petitioner's failure to pay it compensation would violate the Act.

Petitioner's failure to pay violates Section 201(b) of the Act, which prohibits "practice[s]" by common carriers "in connection with" "interstate or foreign communication" that are "unjust or unreasonable." 47 U.S.C. 201(a) and (b). Under the ordinary meanings of those terms, an IXC's repeated failure to pay compensation to a PSP for dial-around calls is a "practice," and it is undertaken "in connection with" "interstate or foreign communication" (at least insofar as the call goes beyond a State's borders). It is also "unjust or unreasonable." Congress itself determined that PSPs should be "fairly compensated for each and every completed * * * call." 47 U.S.C. 276(b)(1)(A). The FCC, having concluded that the IXC should be the payor, acted reasonably in concluding that the IXC's failure to "fairly compensate[]" the PSP under Section 276 is "unjust or unreasonable" and therefore violates Section 201(b).

Petitioner contends that the FCC's determination is not entitled to deference because it was simply a ruling on a matter—the availability of a private right of action—entrusted to the courts. Congress, however, not the Commission, created the cause of action (and the coextensive administrative rem-

edy) for violations of the Act in Sections 206-208 (47 U.S.C. 206-208). The Commission's determination in this case does not construe those remedial provisions of the Act, but instead construes a core substantive provision of the Act (Section 201(b)) whose deliberately broad terms leave it particularly open to agency elaboration. There is no basis for declining to apply the normal principles of deference to the Commission's determination merely because the consequence of that substantive determination is that respondent has a remedy for the violation in federal court (and before the FCC itself) under the remedial scheme embodied in Sections 206-208. And because the Commission's determination was adopted formally, after notice-and-comment rulemaking, and was an integral element of its development of rules for ensuring compensation of PSPs in accordance with Congress's direction, petitioner's argument that the Commission's determination was not the product of sufficient deliberation is mistaken.

Petitioner's other attacks on the Commission's determination are also without merit. Petitioner argues that, because Section 276(b) does not itself identify who must pay compensation to PSPs, the failure of the IXC to pay such compensation does not violate the Act. But the statute's ambiguity on this point empowers, rather than restricts, the FCC. Section 276(b)(1)(A), moreover, makes clear that PSPs must receive compensation, and the IXC is the most likely candidate to provide that compensation. The Commission therefore acted well within it authority in placing the payment obligation on a particular IXC. Petitioner also argues that Section 201(b) itself does not mention payphone compensation. But Section 201(b) does not mention *any* particular practice. Petitioner's crabbed view of the scope of Section 201(b) is inconsistent with longstanding judicial and administrative precedent, and it would undermine the important role of Section 201(b) in the regulatory scheme. Moreover, petitioner's argument would

call into question the ability of the FCC to enforce a PSP's right to compensation at all, as well as important rules regulating other aspects of a carrier's conduct. The Act's basic remedial provisions in Sections 206-208 make judicial and administrative remedies coextensive; if no judicial remedy lies for a failure to compensate PSPs, it is likely that no administrative remedy would lie under those provisions either.

Finally, petitioner's argument that Section 201(b) covers only relations between carriers and their customers requires reading a broad, nontextual limitation into Section 201(b) that conflicts with the Commission's consistent understanding of Section 201(b) in a variety of contexts. In *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 371-372 (1986), this Court rejected an analogous attempt by carriers to limit their liability. The substance of the relationship between the PSP and IXC in the dial-around setting is that each provides the other with a service and each is, in substance, the customer of the other. The PSP provides the IXC with access to payphone users, while the IXC provides the PSP with long-distance services for payphone users. Even under petitioner's theory, therefore, the FCC reasonably concluded that an IXC's failure to pay compensation violates Section 201(b).

ARGUMENT

I. A FAILURE TO PAY DIAL-AROUND COMPENSATION IS ACTIONABLE IN FEDERAL COURT UNDER SECTIONS 206 AND 207 OF THE COMMUNICATIONS ACT IF IT VIOLATES SECTION 201(b) OF THE ACT

1. Congress mandated that the Communications Act would be enforceable, in substantial part, through private actions in district courts. Specifically, it provided in Section 206 that if a carrier "shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or

thing in this chapter required to be done," that carrier "shall be liable" to an injured party "for the full amount of damages" caused by such violation. 47 U.S.C. 206. Congress provided further in Section 207 that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter" may choose "*either* [to] make complaint to the Commission as hereinafter provided for [in 47 U.S.C. 208], *or* * * * [to] bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction." 47 U.S.C. 207 (emphasis added). Congress thus created an express right of action for *any* person against *any* common carrier for *any* violation of the Communications Act. Petitioner errs in suggesting (Br. 18-21, 36) that this case involves an implied right of action. Congress's judgment in Section 207 is express. The only question before the Court is whether an IXC's failure to pay dial-around compensation violates any part of the Communications Act; if so, it is actionable in federal court under the express terms of Section 207.

2. In this case, the conduct at issue violates Section 201(b) of the Communications Act, 47 U.S.C. 201(b). The prior subsection, Section 201(a), requires common carriers to furnish "interstate or foreign communication by wire or radio * * * upon reasonable request therefor." 47 U.S.C. 201(a). Section 201(b) provides, in relevant part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.

47 U.S.C. 201(b). Section 201(b) thus expressly "declare[s] to be unlawful" all "practices" by common carriers "in connection with" "interstate or foreign communication" that are

"unjust or unreasonable." Under the plain terms of Sections 206 and 207, a common carrier that engages in such practices is liable for damages to an injured party in an action in federal court.

3. Although petitioner invokes *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), as a basis for rejecting a cause of action, *Alexander* in fact supports the court of appeals' holding that an action in federal court is available here. In *Alexander*, this Court held that the cause of action the Court had inferred from Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, did not extend to practices that violated only the regulatory prohibition on practices with disparate impact and not the statute's proscription of intentional discrimination. *Alexander* thus stands for the proposition that, absent a specific congressional intent to the contrary, an implied right of action under a federal statute will not be extended to conduct that does not violate the statute itself.

Even in the context of an implied right of action, however, administrative action may be crucial in assessing the scope of the statutory rights enforceable in federal court. As the Court explained in *Alexander*,

> regulations applying [the statute's] ban on intentional discrimination are covered by the cause of action to enforce [the statute]. Such regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

532 U.S. at 284 (citations omitted). A cause of action for violation of a statute, even when not express, extends to all violations of the statute, including violations based on permissible

regulatory constructions of the statutory prohibitions; it would be "meaningless" to contend otherwise.

4. The same result follows *a fortiori* in the context of the *express* cause of action set forth in Sections 206 and 207, which broadly encompass *any* violation of the Communications Act by common carriers like petitioner.[1] Thus, if an IXC's failure to pay fair compensation to a PSP is an "unjust or unreasonable" practice proscribed by Section 201(b), it may be remedied in an action under Section 207. Moreover, the Commission's construction of that statutory phrase, which is hardly self-defining, can provide the basis for a Section 207 claim. Nothing in *Alexander* remotely suggests to the contrary. On the other hand, if an IXC's failure to pay fair compensation to a PSP is not an "unjust or unreasonable" practice under Section 201(b), then, unless it violates some other provision of the Act, it may not support a private action in federal court under Section 207. Indeed, no party to this proceeding has contended—and the Commission has never argued—to the contrary.

In the end, *Alexander* only bolsters the court of appeals' conclusion that a cause of action lies under Section 207 in this case. *Alexander* makes clear that, even in the context of an inferred cause of action, conduct that violates a statute only because an administrative agency had validly construed the statute to extend to that conduct falls within the statutory cause of action, no less than conduct unambiguously prohibited by the statute: "A Congress that intends the statute to

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[1] The question presented in the petition asks "[w]hether [Section 201(b)] creates a private right of action." Pet. i. Neither the PSP nor the Commission has contended that Section 201(b) creates a private right of action, however, and the court of appeals did not so hold. The sole issue in this case is whether a carrier's failure to "fairly compensate[]" a PSP, 47 U.S.C. 276(b)(1)(A), is a violation of the Communications Act. If so, the private right of action that Congress expressly created in Section 207 is clearly available.

be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284. Thus, *Alexander* teaches that the Commission's valid substantive interpretation of the "just and reasonable" standard of Section 201(b) legitimately governs the contours of the cause of action expressly provided in Section 207.

II. A FAILURE TO PAY DIAL-AROUND COMPENSATION VIOLATES SECTION 201(b)

A. An IXC's Failure To Pay Compensation To A PSP Is An Unjust And Unreasonable Practice Under Section 201(b)

Section 201(b) prohibits, and expressly "declare[s] to be unlawful," all "practices" by common carriers "in connection with" "interstate or foreign communication" that are "unjust or unreasonable." 47 U.S.C. 201(a) and (b). Thus, an IXC's failure to pay compensation to a PSP violates Section 201(b) if it is a "practice[]" by a common carrier "in connection with" "interstate or foreign communication" that is "unjust or unreasonable." The court of appeals correctly held that it is.

1. Under the ordinary meanings of the terms involved, an IXC's failure to pay compensation to a PSP for dial-around calls is a "practice" by a carrier "in connection with" "interstate or foreign communication." There is no dispute that IXCs are acting as common carriers when they carry dial-around calls from payphones, and that the dial-around calls themselves, insofar as they go beyond a State's borders, are "interstate or foreign communication" provided by the IXC. Especially when, as is alleged here, an IXC has repeatedly failed to make payments to a PSP, that failure is naturally described as a "practice" that is "in connection with" such "interstate or foreign communication."

To be sure, there are limitations on what constitutes a "practice" under Section 201(b). As the court of appeals ex-

plained, "the term 'practice' must be interpreted to be consistent with the words around it—that is, it must be a practice connected 'with the fixing of rates to be charged and prescribing of service to be rendered.'" Pet. App. 16a (quoting *Missouri Pac. R.R.* v. *Norwood*, 283 U.S. 249, 257, modified, 283 U.S. 809 (1931)). Thus, the term "practice" in Section 201(b) would not extend to a carrier's employment decisions, as in *Missouri Pacific*, the method of selection of its board of directors, as in *California Independent System Operator Corp.* v. *FERC*, 372 F.3d 395, 400-402 (D.C. Cir. 2004), or its purchases of equipment from its suppliers, see AT&T Br. 6. This case, however, involves a practice (the IXC's failure to pay the PSP) that the IXC undertakes directly "in connection with" its provision of common carrier communication services under Section 201(b). Accordingly, the failure to pay that fee is a "practice" that is "in connection with" the provision of service.

2. Although the meaning of the terms involved is sufficiently clear to establish that an IXC's failure to provide fair compensation to a PSP is a "practice" "in connection with" "interstate or foreign communication," the FCC's determination in the *2003 Payphone Order* eliminates any doubt on the matter. In that order, the Commission determined that "[a] failure to pay in accordance with the Commission's payphone rules * * * constitutes * * * an unjust and unreasonable practice in violation of section 201(b) of the Act." 18 F.C.C.R. at 19,990 ¶ 32. As this Court has recently reaffirmed, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). Accordingly, the Commission's construction of the Act is entitled to *Chevron* deference. *Ibid.*; accord *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 377-378 (1999).

3. An IXC's failure to pay compensation to a PSP is likewise "unjust or unreasonable" within the meaning of Section 201(b). In enacting Section 276(b)(1)(A), Congress determined that it was necessary "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 42 U.S.C. 276(b)(1)(A). It thus follows that it is "unjust or unreasonable" under the Act for the PSP not to be paid such "fair[] compensat[ion]." Although Congress left the designation of the identity of the proper payor to the agency's expert judgment, it surely understood that an IXC was the most likely candidate. As the Commission explained in 1996, there were three possible types of payment structures under Section 276(b)(1): "caller pays"; a "set use fee" approach, under which an IXC would individually bill each caller a predetermined fee for each payphone call and then remit the proceeds to the PSP; and "carrier pays," under which an IXC would simply pay PSPs directly for each call (leaving it to the IXC whether and how to collect a payphone-related fee from the caller). *1996 Payphone Order*, 11 F.C.C.R. at 20,584-20,586. Congress itself had effectively eliminated the "caller pays" approach when it prohibited the Commission from requiring "advance payment by consumers." 47 U.S.C. 226(e)(2); see *1996 Payphone Order*, 11 F.C.C.R. at 20,585 ¶ 85. Both the "set use" fee and the "carrier pays" approaches in the end required IXCs to make payments to PSPs, although they differed in their details. Congress therefore would likely have anticipated that the obligation to pay fair compensation to PSPs would ultimately fall upon IXCs, who are the "primary economic beneficiar[ies]" of long distance telephone calls. *Id.* ¶ 83. Accordingly, an IXC's failure to pay fair compensation to a PSP is readily viewed as an unjust and unreasonable practice under the Act.

In any event, the FCC has promulgated rules that eliminate any doubt about the question by requiring IXCs to compensate PSPs for long distance calls. See 47 CFR 64.1300. Those rules are not—and cannot be—challenged in this proceeding, because review of them was available solely by means of a petition for review to the court of appeals. See 28 U.S.C. 2342(1); 47 U.S.C. 401(a). In light of (a) the statutory requirement that PSPs be "fairly compensated for each and every * * * call," (b) the status of the IXC under the Act as the likely party obligated to pay compensation, and (c) the FCC's determination (which cannot be challenged here) pursuant to delegated authority that the IXC indeed should be the party providing the compensation, the FCC's additional determination that an IXC's failure to pay a PSP is an "unjust and unreasonable" practice within the meaning of Section 201(b) is a reasonable one, and it is entitled to deference.[2]

B. The Commission's Interpretation Of Section 201(b) Is Entitled To *Chevron* Deference

Petitioner argues (Br. 30) that the Commission's determination that an IXC's failure to pay compensation to a PSP is unjust and unreasonable under Section 201(b) is not entitled to deference, because it "concerns the scope of the Act's private cause of action, not substantive statutory terms," and because "it is not explained by sufficient * * * reasoning."

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[2] Petitioner errs in contending (Br. 40) that the FCC's view in this case entails the conclusion that "violating virtually any regulation respecting common carriers would violate section 201(b))." The FCC has not found that all violations of its rules by carriers constitute unjust and unreasonable practices. See, *e.g.*, *American Tel. & Tel. Co.*, 71 Rad. Reg. 2d (P&F) 775, 777 (1992) (issuing "strong admonition" to company that used improper marketing practices, but finding that carrier's conduct was not an unjust or unreasonable practice). Because an IXC's failure to pay "fair[] compensat[ion]" under Section 276 is readily viewed as "unjust or unreasonable," this case does not require demarcation of the outermost limits of the Section 201(b) "just and reasonable" standard.

Both halves of petitioner's argument are wrong. The Commission's determination reflects an interpretation of the substantive requirements of the Act in an area of core Commission expertise, and it embodies a considered exercise of discretion that was an essential part of the Commission's reasoning underlying the rules it adopted for compensating PSPs.

1. The *2003 Payphone Order* had its roots in ongoing problems in the collection of dial-around compensation and the FCC's search for ways to ensure that PSPs actually received payments due. When it set the original per-call payment rate in 1999, an important issue before the Commission was whether to add a bad-debt allowance to compensate PSPs for payments never in fact made. The Commission declined to add such an allowance, due to a lack of data available at that time. See *1999 Payphone Order*, 14 F.C.C.R. at 2618-2620 ¶¶ 160-162. The D.C. Circuit affirmed that ruling, relying in part on the availability of damages remedies under the Communications Act, which the IXCs themselves asserted were available. See *American Pub. Commc'ns Council*, 215 F.3d at 56.

When the Commission returned to the matter, the problem had not been resolved; the Commission "found that * * * PSPs have been frustrated in their efforts to receive compensation for certain coinless calls." *Second Order on Reconsideration*, 16 F.C.C.R. at 8102; see *id.* at 8102 n.22 (noting PSP reports that as much as 50% of compensation due from large IXCs was not being paid). The PSPs proposed that the FCC change the payment rules to make it easier for them to collect dial-around compensation for calls handled by more than one IXC. *Id.* at 8099 n.1. The IXCs responded, in part, by arguing that the Commission should not change the rules, but that PSPs should "resort to the usual collection remedies" against IXCs. Frontier Corp. Cmts. at 4 (May 17, 1999); see Qwest Comm'ns Corp. Cmts. at 7 (May 17, 1999) ("PSPs that are

unable to collect payments * * * may use the Commission's enforcement mechanisms to stake their claim."). The Commission did not directly address the collection problem, but modified its rules governing which IXC was responsible for payment when more than one IXC handled a call. 16 F.C.C.R. at 8104-8108. The Commission placed payment responsibility on the first IXC, which might facilitate collection efforts.

The modified rules were vacated for failure of adequate notice. *Sprint*, *supra*. On remand, the FCC's determination to return to the rule that the switch-based reseller, rather than the first IXC, should pay the PSP for calls involving multiple IXCs was subject to the objection that the PSP would be better able to collect from the first IXC to receive the call. The FCC, however, determined that its rules would be adequate to protect the fair-compensation rights of PSPs, based in part on its conclusion that a failure to pay is "an unjust and unreasonable practice in violation of section 201(b) of the Act." *2003 Payphone Order*, 18 F.C.C.R. at 19,990 ¶ 32.

That procedural history demonstrates that the problem of IXC non-payment was central to the Commission's action. The Commission's determination that an IXC's failure to pay fair compensation would constitute an unjust and unreasonable practice was an integral part of its justification for adopting the compensation scheme urged by the IXCs themselves, rather than the first-IXC rule favored by the PSPs. As the court of appeals put it, "it is apparent that the Commission considered the ability of PSPs to recover compensation for dial-around calls in private actions to be integral to the proper functioning of the payphone compensation system." Pet. App. 11a. "[I]n adopting the final rules in the *2003 Payphone Order*, the Commission relied on the availability of actions for damages under §§ 206 and 207." *Id.* at 13a.

2. Petitioner argues (Br. 30) that the Commission's determination is due no deference because the agency did not inter-

pret the "substantive statutory terms" of the Communications Act, but instead merely "opine[d] respecting the presence of federal judicial power to provide remedies." Petitioner is incorrect. As the foregoing discussion makes clear, the *2003 Payphone Order* includes a substantive determination about the scope of Section 201(b)'s express prohibition of unjust and unreasonable carrier conduct, just as prior FCC decisions concluding that it would be unreasonable for carriers to engage in conduct ranging from the failure to obey merger conditions, to slamming, to blocking access to IXCs from payphones were substantive determinations about permissible carrier conduct under the Act. See p. 24, *infra*. The fact that the Commission recognized the remedial consequences of its substantive determination does not alter the nature of the Commission's decision.

The Commission did not purport to recognize a new cause of action or delimit the scope of judicial power; Congress did that when it provided a federal judicial, as well as administrative, remedy for any breach of the Communications Act, including a violation of Section 201(b). But Congress delegated to the FCC the authority to exercise its expertise to decide which acts of carriers were unjust and unreasonable in this, as in other, areas under Section 201(b), and the Commission exercised that authority in the *2003 Payphone Order*.[3] Petitioner's contrary argument would mean that the FCC could *never* receive deference in construing the substantive obligations of common carriers under the Communications Act, be-

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[3] For that reason, petitioner's reliance on *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990), is misplaced. There, the Court found that the statute at issue was not ambiguous on the relevant point, and the agency's ruling to which the Court declined to defer explicitly addressed the availability of a judicial remedy, rather than the meaning of the statute's substantive requirements. *Adams Fruit* has no bearing here, where the statute is ambiguous and the agency's ruling defines the substantive scope of the statute's prohibitions.

cause all such obligations are judicially enforceable under Section 207. Merely to state that proposition is to refute it.

3. Petitioner also contends (Br. 33) that the *2003 Payphone Order* merits no deference because it "was not the product of sufficient deliberation or explanation." This Court has never refused to grant *Chevron* deference to an agency's interpretation of a statute merely because the agency has not explained its rationale in great detail, when the agency has responsibility to administer the statutory program and has formally adopted that interpretation. And in any event, as the procedural history of the *2003 Payphone Order* makes clear, the FCC's ongoing efforts to ensure that PSPs are able to collect the money they are owed, which culminated in that order, reflect extensive consideration and deliberation by the agency. See Pet. App. 11a. The Commission had specifically invited comment on "whether PSPs have access to adequate avenues of relief in instances where [the] PSP compensation rules are violated." *2003 NPRM*, 18 F.C.C.R. at 11,012 ¶ 19. And IXCs had informed both the court of appeals and the agency that the Commission's compensation rules need not be modified in favor of PSPs to ensure payment of bad debts precisely because PSPs had the ability to pursue collection actions against defaulting IXCs by the usual means, *i.e.*, complaints filed with the Commission or the courts. See pp. 17-18, *supra*. Thus, contrary to petitioner's assertion (Br. 33), the Commission sought comment on the matter, the parties' comments had addressed the issue, and the Commission considered and resolved it in the course of establishing the rules for PSP compensation.

Insofar as petitioner's complaint is that the Commission did not elaborate at great length on its conclusion, extensive discussion was not necessary to explain that it is not "just and reasonable" under Section 201(b) for an IXC to fail to provide "fair[] compensat[ion]" to a PSP. 47 U.S.C. 276(b)(1)(A). Cf.

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (on review of administrative action, Court "will * * * 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned'") (citation omitted). Moreover, the Commission did elaborate further in amicus briefs submitted to the Ninth Circuit in this case and to the D.C. Circuit in *APCC Services*. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (granting *Chevron* deference to position taken by agency *only* in amicus brief where "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question"). The Commission satisfied any applicable burden of explanation, and its considered decision is entitled to deference.[4]

C. The Absence Of An Express Reference To Payphone Compensation In Section 201(b) Does Not Preclude A Determination That The Failure To Pay Such Compensation Is Unjust And Unreasonable

Petitioner argues (Br. 26) that, because the statutes that do mention payment of compensation (such as Section 276) "have never suggested a right or wrong way of compensating [PSPs]," and because Section 201(b) itself "does not even mention payphone compensation," Section 201(b) "cannot be read indirectly to impose requirements that Congress explicitly declined to impose directly." Petitioner is mistaken.

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[4] If the Court were to conclude that the *2003 Payphone Order* is not entitled to *Chevron* deference, it should nonetheless hold, for the reasons explained in this brief, that a failure to pay dial-around compensation is an unjust and unreasonable act that violates Section 201(b), and affirm the court of appeals' judgment on that ground. See *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). And if the Court were disinclined to reach that result in the absence of further authoritative guidance from the Commission, a referral for the Commission to exercise its primary jurisdiction would be appropriate.

1. As noted above, petitioner's first premise is incorrect. Section 276's prescription that PSPs must be compensated for "each and every completed * * * call," read against Congress's effective preclusion of a "caller pays" system elsewhere in the Act, is most reasonably understood to suggest that the "right * * * way of compensating" PSPs must involve payment by an IXC to the PSP. Congress did leave the details of the PSP compensation system to the FCC, and in that sense it did not directly impose the requirement that the IXC pay. But that delegation of authority to the FCC *supports* the conclusion that the FCC has authority to fill in the content of the "just and reasonable" standard as it applies to payphone compensation. Petitioner argues, in effect, that by expressly delegating to the FCC the authority to regulate payphone compensation, Congress somehow *disabled* the FCC from filling in the content of the general "just and reasonable" standard as applied to that subject matter. Petitioner has things exactly backward, and its argument should be rejected.

2. In any event, petitioner's second premise—that a failure to pay dial-around compensation cannot violate Section 201(b) because "[n]othing in the language of [Section 201(b)] itself requires long distance carriers to compensate payphone service providers for coinless calls," Pet. Br. 20—is also mistaken. Nothing in the language of Section 201(b) itself addresses *any* specific acts. Instead, Section 201(b) refers generally to "*[a]ll* charges, practices, classifications, and regulations." 47 U.S.C. 201(b)(1) (emphasis added). That broad statutory sweep straightforwardly expresses Congress's intent to ensure that *all* such conduct by carriers in connection with interstate service will be subject to regulation, without the need for enumeration of individual practices. Telecommunications regulation is extraordinarily complex and continuously changing, and it would have been impossible for Congress to have specified every practice that ran afoul of

Section 201(b). Congress chose instead to give the Commission wide latitude to determine which practices subject to regulation are "unjust or unreasonable," terms that clearly grant discretion. Petitioner's contrary approach is fundamentally inconsistent with Congress's scheme.

a. The courts of appeals and the Commission have repeatedly rejected petitioner's crabbed view of Section 201(b). In *MCI Telecommunications Corp.* v. *FCC*, 59 F.3d 1407 (D.C. Cir. 1995), cert. dismissed, 517 U.S. 1129 and cert. denied, 517 U.S. 1240 (1996), an IXC filed a complaint alleging that several local exchange carriers (LECs) had exceeded rate-of-return limits that the Commission had adopted under Section 201(b). Much like petitioner here, the LECs argued that because Section 201(b) itself does not mandate any particular rate or rate-of-return limit, the violation of FCC-prescribed limits does not constitute a violation of the Act and cannot serve as the basis for liability. 59 F.3d at 1413. The court rejected the argument, on the ground that a violation of an FCC-prescribed just and reasonable rate was a violation of Section 201(b) itself. *Id.* at 1414.

The Commission has likewise determined that a carrier's practice may be unreasonable within the meaning of Section 201(b) even though the practice itself is not expressly addressed in statutory language. In the *1996 Payphone Order*, for example, the Commission determined that "undue coercion of location providers with respect to their choice of [IXC] for payphones on their premises may be found unjust and unreasonable" in violation of Section 201(b). 11 F.C.C.R. at 20,666 ¶ 252. See, *e.g.*, *TRAC Commc'ns, Inc.* v. *Detroit Cellular Tel. Co.*, 5 F.C.C.R. 4647 (1990) (violation of FCC policy requiring cellular carrier to allow resale of service was unjust and unreasonable); *Competitive Telecomms. Ass'n*, 4 F.C.C.R. 5364 (Common Carrier Bureau 1989) (call blocking, pre-TOCSIA, was unjust and unreasonable).

Petitioner's narrow reading of Section 201(b) would seriously undermine the FCC's enforcement authority. The Commission oversees a vast area of carrier practices in numerous lines of business. As the foregoing examples show, the Commission must have the flexibility to police carrier behavior regarding that entire, and constantly changing, range of activities. In recent years, the Commission has found that the "just and reasonable" standard of Section 201(b) is violated by conduct ranging from "slamming" (*i.e.*, the unauthorized switching of telephone carriers), *NOS Commc'ns Inc.*, 18 F.C.C.R. 6952 (2003), to the negligent disconnection of telephone numbers, *Staton Holdings, Inc.* v. *MCI WorldCom Commc'ns, Inc.*, 19 F.C.C.R. 8699 (Enforcement Bureau 2004), to unreasonable directory assistance practices, *Himmelman* v. *MCI Commc'ns Corp.*, 17 F.C.C.R. 5504 (2002), to charging customers for rejected collect calls, *ASC Telecom, Inc.*, 17 F.C.C.R. 18,654, 18,656 n.18 (2002). Section 201(b), of course, does not expressly mention any of those matters, and petitioner's view that Section 201(b) can reach only conduct that is expressly mentioned in that provision would transform it from a valuable tool for the Commission's policing of carrier activity into an essentially useless irrelevancy.

b. Petitioner's argument would also significantly inhibit, if not eliminate, the administrative complaint process in many cases. In Section 207, Congress provided that "[a]ny person claiming to be damaged by any common carrier * * * may *either* make complaint to the Commission as hereinafter provided for, *or* may bring suit for the recovery of the damages for which such common carrier may be liable." 47 U.S.C. 207 (emphasis added). Congress thus chose to make the judicial and administrative remedies under the Communications Act coextensive, giving the complainant the option to seek damages (as defined by Section 206) either in federal court or at

the FCC.[5] If, as petitioner contends, Section 207 does not give PSPs a cause of action for damages in federal court, it is difficult to see how it could permit such a remedy at the FCC.

As the foregoing discussion shows, moreover, petitioner's approach could have effects in regulatory areas far beyond payphone compensation disputes and has the potential to restrict dramatically private enforcement of the Communications Act. See p. 24, *supra* (listing examples of Commission determinations of unjust and unreasonable practices); see also *Telephone Number Portability*, 18 F.C.C.R. 23,697, 23,709 n.76 (2003) (noting that "a violation of [FCC's] number portability rules would constitute an unjust and unreasonable practice under section 201(b) of the Act"); *Business Disc. Plan, Inc.*, 15 F.C.C.R. 24,396 (2000) (deceptive marketing practices violate Section 201(b)); *WATS Int'l Corp.* v. *Group Long Distance (USA), Inc.*, 11 F.C.C.R. 3720, 3728-3729 (Common Carrier Bureau 1995) (failure to inform customer of change in long distance carrier is unjust and unreasonable under Section 201(b)); see also *Core Commc'ns, Inc.* v. *SBC Commc'ns, Inc.*, 18 F.C.C.R. 7568, 7578 ¶ 25 (2003) (failure to comply with a merger condition is unjust and unreasonable), vacated on other grounds, *SBC Commc'ns, Inc.* v. *FCC*, 407 F.3d 1223 (D.C. Cir. 2005).

c. Petitioner and AT&T recognize the difficulties posed by their interpretation of Section 201(b), but insist that there are other adequate avenues of enforcement at least of carriers' payphone compensation obligations. Pet. Br. 17-18; see

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[5] By providing for coextensive judicial and administrative remedies in Section 207, Congress necessarily rejected petitioner's argument (Br. 41) that a private action for violation of Section 201(b) would vest the primary role in interpreting the Communications Act in the judiciary rather than the FCC. As long as courts entertaining actions under Section 207 properly defer to the FCC's substantive interpretation of the statute (and invoke the doctrine of primary jurisdiction where appropriate), there is no reason to think the courts will usurp the FCC's primary role. See *Brand X*, 125 S. Ct. at 2700-2701.

AT&T Br. 15-16. They argue that the FCC can collect fines or forfeitures under 47 U.S.C. 502-503. Those provisions, however, apply only to violations that are "willful[] and knowing[]." 47 U.S.C. 502. Proof of such intent-based standards is not always available, and forgiving carriers' compensation obligations in the absence of such proof would be at war with Congress's intent to ensure compensation "for *each and every*" completed call. 47 U.S.C. 276(b)(1)(A) (emphasis added). Even where the "willful[] and knowing[]" standard can be satisfied, moreover, fines and forfeitures under Sections 502 and 503 would go to the United States Treasury, not to payphone providers (or other victims of unjust practices). See 47 U.S.C. 503(b)(1)(A). It was thus "reasonable for the FCC to conclude that Congress would not have intended to grant PSPs an entitlement to compensation and to give the Commission broad authority to establish a mechanism to provide that compensation, but simultaneously to limit the enforcement of the statute and implementing regulations to the imposition of civil penalties." Pet. App. 20a-21a.

Petitioner also argues (Br. 17-18) that Section 276, combined with 47 U.S.C. 154(i), which grants the FCC authority to take action that is "necessary in the execution of its functions," permits the FCC to craft an enforcement procedure specific to payphone compensation. Although such a regime might be permissible, it is far from clear that Section 154(i) provides the authority that petitioner assumes. See, *e.g.*, *Motion Picture Ass'n of Am., Inc.* v. *FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (striking down an FCC rule promulgated pursuant to Section 154(i)); *American Library Ass'n* v. *FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) ("ancillary jurisdiction" of FCC under Section 154(i) is "constrained"). In particular, those opposing such an FCC-crafted procedure would no doubt argue that Congress would not have intended to allow the FCC to create an administrative remedy that parallels the

already existing mechanisms under Sections 206-208 if those statutes themselves deny administrative relief.[6]

D. Petitioner's Argument That Failure To Pay Compensation Is Not A "Practice" Under Section 201(b) Is Wrong

Petitioner argues that an IXC's failure to pay compensation to a PSP is "not * * * a communications 'practice' covered by section 201(b)," because Section 201(b) "regulates carriers' relationships only with customers who request communications service." Pet. Br. 37. In petitioner's view, because the PSP is not the "customer" of an IXC when a dial-around call is made, an IXC's failure to pay the PSP for the call cannot be prohibited by Section 201(b). Petitioner's contention that the plain language of Section 201(b) must be read to contain an implicit limitation to carrier-customer relationships—a limitation that Congress chose not to enact—is mistaken. In addition, petitioner's argument is based on a mischaracterization of the relationship between a PSP and an IXC.

1. Section 201(b) was deliberately drawn in broad terms to address the wide variety of problems that may arise in the complex field of communications. Its requirement of just and reasonable behavior thus applies to *all* charges and practices, both "for" *and* "in connection with" interstate communications services. As the D.C. Circuit has recognized, the "generality" of the language of Section 201(b) "opens a rather large area for the free play of agency discretion." *Bell Atlantic Tel. Cos.* v. *FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

The Commission has previously found violations of Section 201(b) even when the complainant was not a customer of the

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[6] Petitioner claims that the FCC has "already established detailed procedures that allow payphone service providers to seek administrative resolutions of disputes just like this one." Pet. Br. 18; see Sprint Br. 9. But those procedures are simply ordinary complaint procedures under Section 208, which (like Section 207) are limited to violations of the Act itself. See 47 U.S.C. 208(a); 47 C.F.R. 1.719 (rules for FCC complaint procedures).

carrier. *Ascom Commc'ns, Inc.* v. *Sprint Commc'ns Co.*, 15 F.C.C.R. 3223, 3227 ¶ 9 (2000) (attempt by carrier to charge PSP for "calls for which Ascom was not a customer"); *AT&T* v. *MCI*, 9 F.C.C.R. 2688 (Common Carrier Bureau 1994) (in Section 208 damage action, finding violation of Section 201(b) when one IXC claimed another IXC violated FCC rule governing agreements with foreign telephone carriers). Indeed, as the latter decision illustrates, both Section 201(a) and Section 201(b) may govern the relationship between carriers, not merely between a carrier and its ultimate retail customers. Because Section 201(b) clearly applies to a carrier that purchases services from another carrier, it would be odd if it did not provide reciprocal coverage to the carrier providing the service when the purchasing carrier engages in unjust and unreasonable conduct. The court of appeals was thus correct in holding that the "practices" addressed by Section 201(b) are not limited by customer relationships. The statute "is ambiguous enough that unjust or unreasonable practices can encompass a broad range of activities related to the services provided and rates charged by a long distance carrier." Pet. App. 17a.

In *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 371-372 (1986), this Court rejected an argument analogous to the one raised here. AT&T and the local exchange companies argued, as they do here, that the terms "charges," "classifications," "practices," and "regulations" used in 47 U.S.C. 152(b) did not cover carriers' depreciation practices because bookkeeping practices did not relate directly to customer relationships. The Court "reject[ed] this narrow reading" of the statute and held instead that the terms should be given more generally accepted meanings. 476 U.S. at 371. Common carriers, such as petitioner, that are subject to the strictures of Section 201(b), surely would prefer the narrowest reading of that provision. But if Congress had intended to

limit the scope of Section 201(b) to customer relationships expressed in a carrier's tariffs, it would have either said so directly or simply included the "just and reasonable" requirement in the Section 203 tariff provisions, rather than placing the requirement in a stand-alone section, thus suggesting a broader scope of application.[7]

2. In any event, petitioner oversimplifies (Br. 37) the relationship between a PSP and an IXC. To be sure, in a dial-around context, the PSP is not a "customer" of the IXC in the sense of paying a fee to the IXC for a service, but neither is the PSP a single "supplier[]," comparable to a supplier of equipment or business supplies, from which the IXC "purchases inputs." AT&T Br. 5. The substance of the relationship between the PSP and the IXC bears a close similarity to the relationships between carriers and between carrier and customer clearly governed by the Act. For example, when, outside the dial-around context, a PSP independently contracts with an IXC to be the PSP's default long-distance carrier, the PSP could collect from the caller and remit a portion of the proceeds to the IXC, or the IXC could collect from the customer and remit a portion to the PSP. Depending on the precise arrangement, it could thus be said that the IXC is a "customer" of the PSP, purchasing access to the caller, or the PSP is a "customer" of the IXC, purchasing long distance services. Whichever way the funds flow, either the PSP or the IXC in substance could be viewed as the customer of the other.

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[7] AT&T argues (Br. 8-11) that other nearby provisions in the Communications Act apply only to carriers' relationships with their customers, and that Section 201(b) should be similarly limited. But those provisions are limited to to carrier-customer relationships only because Congress included additional terms in those provisions, not present in Section 201(b), that had that effect. Those terms were not superfluous, and their absence in Section 201(b) dooms AT&T's argument.

Similarly here, although the flow of funds goes from the IXC to the PSP under the FCC's rules (and under Congress's effective preclusion of a "caller pays" approach), the IXC-PSP relationship is closely analogous to the core relationships that would be governed by Section 201(b) even under the narrowest reasonable construction of that provision. Indeed, Congress forced the PSP into the relationship with the IXC because 47 U.S.C. 227(c)(1)(B) prohibits a PSP from blocking a customer's access to any long distance carrier. Insofar as this Court's decision construing the Interstate Commerce Act in *Missouri Pacific* applies to the Communications Act (see Pet. Br. 40), it confirms that result; in the terms of *Missouri Pacific*, the IXC's relationship with the PSP does not "differ widely in kind from the subject covered by" Section 201(b), and it "reasonably may be thought similar to or classified with the regulation of" carrier relationships covered by the Communications Act. 283 U.S. at 257.[8]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[8] Petitioner also contends (Br. 37) that because Section 201(b) applies only to interstate and international calls, but Section 276 applies to all calls, including intrastate calls, there is a "jurisdictional disconnect" between the two statutes that demonstrates that Section 201(b) cannot apply to a carrier's failure to pay dial-around compensation. That claim (which has never been raised before and was not addressed below) is illogical: even if Section 276 may cover a broader territory than Section 201(b), that does not mean that the two provisions cannot apply to some of the same activities. At most, if it were possible to separate interstate and intrastate calls, any jurisdictional limitation in Section 201(b) would limit respondent's recovery in its federal cause of action to compensation for interstate calls. In any event, the district court may exercise pendent jurisdiction to allow a PSP to recover for intrastate calls under state law, as the court of appeals held respondent could do in this case. Pet. App. 30a-36a. To the extent that any state law is inconsistent with the requirements of Section 276 as implemented by the FCC, the FCC's regulations "shall preempt such State requirements." 47 U.S.C. 276(c).

Respectfully submitted.

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JULY 2006

STATUTORY AND REGULATORY APPENDIX

1. 47 U.S.C. 201 provides:

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent

a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

2. 47 U.S.C. 206 provides:

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

3. 47 U.S.C. 207 provides:

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

4. 47 U.S.C. 208 provides:

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

5. 47 U.S.C. 226 provides, in relevant part:

§ 226. Telephone operator services

* * * * *

(c) Requirements for aggregators

(1) In general

Each aggregator, beginning not later than 90 days after October 17, 1990, shall—

* * * * *

(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

* * * * *

(e) Separate rulemaking on access and compensation

* * * * *

(2) Compensation

The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after October 17, 1990, the Commission shall reach a final decision on whether to prescribe such compensation.

* * * * *

6. 47 U.S.C. 276 provides, in relevant part:

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service—

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on February 8, 1996, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

* * * * *

7. 47 C.F.R. 64.1300 provides:

§ 64.1300 Payphone compensation obligation.

(a) For purposes of this subpart, a Completing Carrier is a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes a local, coinless access code or subscriber toll-free payphone call.

(b) Except as provided herein, a Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by the parties by contract.

(c) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.

(d) In the absence of an agreement as required by paragraph (b) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of $.494.

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Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR AT&T AND VERIZON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, *amici* AT&T Inc. and Verizon state the following:

On November 18, 2005, SBC Communications Inc. merged with AT&T Corp. That same day, SBC Communications Inc. changed its name to AT&T Inc. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Verizon Communications Inc. is a Delaware corporation with its principal place of business in New York. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Subsidiaries of AT&T Inc. and Verizon Communications Inc. – including local telephone companies (some of which are Bell Operating Companies ("BOCs") as defined in 47 U.S.C. § 153(4)) and interexchange carriers – provide interstate common-carrier services, subject to statutory duties set forth in the Communications Act of 1934 (the "Act"). Those duties include the duty to provide "communication service" on terms that are "just and reasonable." 47 U.S.C. § 201(b). In their capacity as common carriers, those subsidiaries are subject to private actions for damages under Sections 206 and 207 of the Act, which provide not only for "recovery of . . . damages for which [a] common carrier may be liable" but also for payment of "reasonable counsel or attorney's fee." *Id.* §§ 206, 207. *Amici* thus have an interest in ensuring that Section 201(b) – and the private right of action under Sections 206 and 207 available to enforce it – is properly construed to govern the terms of the relationship between carriers and their customers and not other matters.

At the same time, subsidiaries of AT&T and Verizon are also the nation's largest payphone service providers. *Amici* understand first-hand the business importance to payphone service providers of the per-call compensation that is the subject of this litigation. *Amici* have an interest in ensuring that the Court's resolution of this case does not call into question the authority of the Federal Communications Commission ("FCC" or "Commission") under Section 276 of the Act to establish a regulatory mechanism to "ensure" that payphone service providers are "fairly compensated" for the use of their payphones. 47 U.S.C. § 276(b)(1)(A).

---

[1] Counsel for *amici* authored this brief, and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for all parties have consented to the filing of this brief, and letters reflecting the parties' consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

A. A long-distance carrier's failure to pay per-call compensation cannot constitute an "unjust or unreasonable" "practice" within the meaning of 47 U.S.C. § 201(b). The Act's language and structure make clear that Section 201(b) regulates a carrier's provision of service to its customers and does not address the relationship with its suppliers. Section 201(a) requires carriers to provide interstate and foreign communication service "upon reasonable request." *Id.* § 201(a). Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service . . . be just and reasonable" and that any "unjust or unreasonable" charge, practice, classification, or regulation shall be "unlawful." *Id.* § 201(b). The most natural reading of this language is that it applies to the terms under which a carrier *provides* service to those that request it, not the terms under which the carrier *acquires* goods or services from its suppliers that may be used in the provision of communication service.

B. No other reading of Section 201(b) is possible when the provision is read in light of the statute as a whole. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002). The statutory quartet of "charges, practices, classifications, and regulations" refers to the terms under which a common carrier provides service, traditionally as set forth in its filed tariffs. Section 203 requires common carriers to file tariffs showing "all *charges*" and "*classifications, practices, and regulations* affecting such charges." 47 U.S.C. § 203(a) (emphases added); *see also id.* § 203(b)(1) (referring to process for making changes "in the *charges, classifications, regulations, or practices*" contained in tariffs) (emphasis added). As this Court has observed, the common-carrier duties imposed under the Act are "premised" on the understanding that carriers' duties would be embodied in their filed tariffs. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230 (1994) ("Much of the rest of the Communications Act subchapter applicable to Common Carriers . . . [is] premised upon the

tariff-filing requirement of § 203."). Indeed, in defining the "charge[s], classification[s], regulation[s], or practice[s]" that might be subject to complaint under Section 208 of the Act, 47 U.S.C. § 208(b)(1) – the administrative analog to Sections 206 and 207 – the FCC itself held that the phrase is limited to the kinds of activities governed by filed tariffs. *See Formal Complaint Order*,[2] 12 FCC Rcd at 22512-14, ¶¶ 34-37.

C. Although a carrier might impose an additional charge on a customer for a call placed from a payphone, the carrier's failure to pay to the payphone provider the compensation required under the Commission's regulations is not a "practice" involving the provision of service to the customer or that otherwise "affects" the manner in which the carrier assesses charges on its customer under the terms of a tariff. It therefore is not the type of "practice" that could be "unjust or unreasonable" within the meaning of Section 201(b).

In addition, the claim that failure to pay per-call compensation under the FCC's regulation violates Section 201(b) would give rise to a jurisdictional mismatch. Section 201(b) deals only with interstate and foreign communications, while Section 276 addresses "intrastate and interstate call[s]." *Compare* 47 U.S.C. § 201(a)-(b) *with id.* § 276(b)(1)(A). The FCC's per-call compensation rules likewise apply to all payphone-originated calls, including not only interstate but also local (*i.e.*, intrastate) calls. *See* 47 C.F.R. § 64.1300(a). Failure to pay compensation for use of a payphone to make a local call is not in any way related to "interstate or foreign" communication within the jurisdictional scope of Section 201(b).

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[2] Report and Order, *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497 (1997) ("*Formal Complaint Order*"), *petition for review dismissed, U.S. West, Inc. v. FCC*, 173 F.3d 865 (10th Cir. 1999) (table).

The FCC's statement in the *Third Payphone Order*[3] that failure to pay per-call compensation violates Section 201(b) is unreasoned and incorrect.

D. The lack of a private right of action under Sections 206 and 207 does not make the FCC's payphone compensation rules unenforceable. The FCC – which is required under Section 276(b)(1)(A) to "ensure" that payphone service providers are "fairly compensated" for calls made from their payphones – has adequate regulatory tools to ensure that its payphone compensation regime is effectively enforced.

ARGUMENT

To place a local call from a payphone, a caller must first deposit coins – usually $.50 – for the use of the payphone. For placement of certain types of calls, including toll-free calls and calls placed using long-distance carriers' access codes, the payphone provider is effectively barred from charging the caller. Instead, pursuant to regulations adopted by the FCC under 47 U.S.C. § 276(b)(1)(A), the common carrier that ultimately delivers the call to the called party's local network – in the absence of some other contractual arrangement – is required to pay the payphone owner a per-call charge. In that arrangement, the payphone owner is not the carrier's customer. On the contrary, the payphone owner is the carrier's supplier, renting its equipment, in effect, so that the carrier can provide service to the carrier's customer. Although Congress authorized the FCC to adopt regulations to ensure that the payphone owner would be compensated for the use of the payphone in that circumstance, it did not authorize the FCC to declare failure to pay such compensation to be a violation of a carrier's duty to provide service on just and reasonable terms.

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[3] Report and Order, *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 19975 (2003) ("*Third Payphone Order*"), *on recon.*, 19 FCC Rcd 21457 (2004).

SECTION 201(b) GOVERNS THE TERMS UNDER WHICH CARRIERS PROVIDE SERVICE TO THEIR CUSTOMERS AND DOES NOT ADDRESS A CARRIER'S FAILURE TO PAY ITS SUPPLIERS

The Ninth Circuit's determination – that the "unjust or unreasonable" "practice[s]" that Section 201(b) prohibits may include a carrier's failure to compensate payphone providers for the use of their payphones – misreads the statute. Section 201(b) addresses the terms and conditions governing the service that a carrier provides. As this Court held, interpreting the analogous term in the Interstate Commerce Act, "[t]he act uses the word 'practice' in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers." *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, 257 (1931).[4] A carrier's alleged failure to pay to its suppliers the compensation required by the FCC's regulations does not fall within the scope of the provision.

A. Section 201(a) contains the Act's core common-carrier obligation, requiring "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor." 47 U.S.C. § 201(a). Section 201(b) then requires that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." *Id.* § 201(b). The natural reading of Section 201(b) is that it addresses the terms under which a carrier *provides* common-carrier services that a customer requests, not the terms under which a carrier purchases inputs from its suppliers. Put another way, Section 201(b) defines the duties

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[4] The Communications Act was modeled on the Interstate Commerce Act, and this Court's precedents under the Interstate Commerce Act accordingly inform the Court's construction of the Communications Act as well. *See AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998).

of the carrier toward its common-carriage customers; it does not define the carrier's duties toward third parties – like the payphone providers at issue here – who are suppliers to the carrier and have made no request for its services.

The use of the phrase "in connection with" does not (contrary to the Ninth Circuit's apparent understanding, *see* Pet. App. 16a) support a broader reading. That phrase is syntactically necessary because, while a carrier imposes "charges . . . *for* . . . service," the "practices, classifications, and regulations" it may establish are "*in connection with* . . . service." 47 U.S.C. § 201(b) (emphases added). It does not suggest that Congress intended to extend the duties of common carriers to parties that have not made any request for common-carrier services. In some colloquial sense, a carrier's habitual failure to pay its equipment vendor for the switches that it deploys in its network can be said to be an "unjust or unreasonable" "practice" that is "connected" to service. But it is inconceivable that Congress would have intended, by regulating common carriage, to have extended regulation to commercial relations between common carriers and their suppliers. *See United States v. Pennsylvania R.R.*, 242 U.S. 208, 229 (1916) ("practices" refers to practices involving "the relation of shippers and carriers").

Any broader reading of the term "practices" in Section 201(b) would clash with the principle that a word is "known by the company it keeps . . . . This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). "Practices" is part of a statutory quartet that also includes "charges, . . . classifications, and regulations." 47 U.S.C. § 201(b). Those additional terms cannot be read to refer to anything other than the terms that a carrier establishes for the common-carrier services it provides. A different and more expansive interpretation of those terms would extend the obligations of Section 201 either to

entities other than common carriers or to activities other than common carriage. As the FCC itself has recognized, that result is contrary to the statute, which limits Title II jurisdiction to activities that are "interstate or foreign communication service[s]" provided by a "person or entity . . . as a common carrier." Report and Order, *Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, 1168, ¶ 31 (1986); *see Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 904-05 (5th Cir. 2002).[5] The term "practices" must be similarly restricted; indeed, this Court has applied the *noscitur a sociis* canon before in construing the meaning of "practices" in the Interstate Commerce Act. *Pennsylvania R.R.*, 242 U.S. at 229 ("Following a well-known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates.").[6]

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[5] A provision added by the Telecommunications Act of 1996 ("1996 Act") reinforces the view that Congress intended to limit common-carrier regulation to common-carrier *activities*. Section 3(44) defines a "telecommunications carrier" as "any provider of telecommunications services." 47 U.S.C. § 153(44). But the definition also provides that "[a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services," that is, "offering of telecommunications for a fee directly to the public." *Id.* § 153(44), (46).

[6] The Court's interpretation of Section 2(b) of the Act in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), is not to the contrary. In the context of Section 2(b) – which *limits* the FCC's authority over intrastate matters and does not refer solely to the duties of common carriers – the Court found that the term "charges" could refer to depreciation charges "for intrastate ratemaking purposes." *Id.* at 372. The Court's holding there makes sense, reflecting the determination that, to preserve state authority over rates, the statute likewise preserves state authority over matters – such as depreciation – that determine rates under the rate-of-return regulations then existing. *See* Michael K. Kellogg, John Thorne & Peter W. Huber, *Federal Telecommunications Law* § 2.10, at 103 (1992) ("In rate making, which includes both choosing the rate of return to apply to the rate base and determining the size of the rate base through depreciation practices, the separations process carves out separate spheres upon which the FCC and state commissions can operate

B. Even if Section 201, standing alone, leaves any ambiguity, the remainder of the statute eliminates it. The Communications Act of 1934, "like every Act of Congress, should not be read as a series of unrelated and isolated provisions." *Gustafson*, 513 U.S. at 570. Section 201(b) is part of the "Communications Act subchapter applicable to Common Carriers." *MCI*, 512 U.S. at 230. Therefore, in construing "practices" in Section 201(b), the Court should look as well to the use of the same term elsewhere in the Act, particularly in the Common Carrier subchapter. *See Gustafson*, 513 U.S. at 570 ("'identical words used in different parts of the same act are intended to have the same meaning'") (quoting *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)).

The "heart of the common-carrier section of the Communications Act" is Section 203, *MCI*, 512 U.S. at 229, which establishes the requirement that carriers file tariffs to govern the provision of service.[7] Section 203(a) provides that "[e]very common carrier . . . shall . . . file . . . schedules showing all *charges* for itself and its connecting carriers for interstate and foreign wire or radio communication . . . and showing the *classifications, practices, and regulations* affecting such charges." 47 U.S.C. § 203(a) (emphases added). In this context, the meaning of "practices" is clear: it refers to activities of the carrier or the customer in the context of provision of

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independently."). But the charges that are the subject of Sections 201-205 are charges for service, and the same is true of the "practices, classifications, and regulations" referred to in those sections.

[7] Exercising its "forbearance" authority under Section 10 of the Act, 47 U.S.C. § 160, the FCC has detariffed certain common-carrier services. *See* Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730 (1996) ("*Detariffing Order*"). That Congress empowered the agency to forbear from enforcement of certain provisions of the statute does not alter the character of Sections 201 through 205 as a "'symmetrical and coherent regulatory scheme.'" *Ragsdale*, 535 U.S. at 86 (quoting *Gustafson*, 513 U.S. at 569); *see also MCI*, 512 U.S. at 234 (noting that "the Act establishes a rate-regulation, filed-tariff system for common-carrier communications").

service. *See also id.* § 203(c) (requiring carriers to adhere to the "charges" and "classifications, regulations, or practices affecting such charges" contained in their tariffs). That same meaning is carried over to Section 204, which authorizes the FCC to "enter upon a hearing concerning the lawfulness" of "any new or revised *charge, classification, regulation, or practice*" that has been "filed with the Commission." 47 U.S.C. § 204 (emphasis added). Likewise, Section 205 authorizes the Commission to prescribe the terms of tariffs under which a carrier offers service, that is, "the just and reasonable charge . . . or charges" and "what classification, regulation, or practice is or will be just, fair, and reasonable." *Id.* § 205.

It would be inconsistent with the statute to argue that "charge, classification, regulation, or practice" has one meaning in Sections 203-205 and another meaning in Section 201 – for example, because Sections 203-205 deal with tariffs, and Section 201 deals with matters that may be embodied in tariffs as well as matters that cannot. Such a reading would clash with another closely related statutory provision, Section 202, which prohibits "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service." *Id.* § 202(a). The discrimination prohibited by the Act is discrimination among "similarly situated customers." *Central Office Tel.*, 524 U.S. at 223; *see also Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 199 (2d Cir. 2001) (a claim under Section 202(a) must allege that a "carrier is *offering . . . service* to other customers at a different price *or under different conditions* than those offered to" the plaintiff) (emphases added, internal quotation marks omitted).[8] The sort of

[8] Section 202(a) does not render the non-discrimination obligation of Section 203(c) surplusage: Section 203(c) requires carriers to adhere to their tariffs and prohibits discriminatory deviations from those tariffs (whether or not such a deviation is unjust or unreasonable). Section 202(a) prohibits unjust or unreasonable discrimination – whether or not the discrimination is embodied in a tariff.

discriminatory "practices" identified in Section 202(a) cannot include differential treatment of similarly situated *suppliers* because a carrier does not offer any service to the supplier. What is true for Section 202(a) is likewise true for Section 201(b).

As this Court recognized in *Central Office Telephone*, the Act "requires the filed tariff to show not only 'charges,' but also 'the classifications, practices, and regulations affecting such charges.'" 524 U.S. at 223 (quoting 47 U.S.C. § 203(a)); *see also Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945) (noting that "charges, practices, classifications, and regulations" "must be filed with the Commission in the form it prescribes"). That is, the common-carrier provisions are concerned with regulating the service relationship between common carriers and their customers. To extend those provisions to reach the relationship between carriers and their suppliers would be to ignore the "statute's text and design." *Gonzalez v. Oregon*, 126 S. Ct. 904, 922-23 (2006).[9]

The FCC's own decisions recognize that the statutory grouping "charge, classification, regulation, or practice" refers to matters that have traditionally been governed by tariffs. Section 208 of the Act authorizes the FCC to hear complaints that a common carrier has violated the Act. 47 U.S.C. § 208. Section 208(b)(1) establishes a strict time limit "with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice," providing that such investigations must be concluded "within 5

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[9] Any broader reading of Section 201(b) would also conflict with Section 601(c)(1) of the 1996 Act, which provides that the Act "shall not be construed to modify, impair, or supersede . . . State . . . law unless expressly so provided." 47 U.S.C. § 152 note. Because the relations between carriers and suppliers is generally governed by state laws of general applicability, a reading of Section 2(b) to reach all commercial transactions would give the FCC authority to displace state law with regard to virtually all transactions involving common carriers. That result is untenable, as the court below acknowledged. *See* Pet. App. 16a-19a.

months after the date on which the complaint was filed." *Id.* § 208(b)(1). The FCC has consistently interpreted Section 208(b)(1) "as applicable only to complaints about matters contained in tariffs filed with the Commission." *Formal Complaint Order*, 12 FCC Rcd at 22511-13, ¶¶ 32, 35; *see also Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1105 (D.C. Cir. 2001) (noting that "[t]he categories listed in § 201(b) are coterminous with those cognizable under § 208(b)"). In the wake of detariffing, the FCC has held that the phrase "charge, classification, regulation, or practice" refers to "those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation" – for example, the claim that "a carrier has imposed unjust and unreasonable terms and conditions on the provision of a service." *Formal Complaint Order*, 12 FCC Rcd at 22514, ¶ 37. The interpretation that the FCC has held applies to this language in Section 208(b)(1) applies as well to Section 201(b).

C. Failure to pay the per-call compensation required by the FCC's regulations thus cannot violate Section 201(b). Section 276(b)(1)(A) does not address carriers' obligations to their customers; it does not address carriers' obligations at all. Rather, that provision directs the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). The fair-compensation provision of Section 276 thus has nothing to do with common-carrier obligations.

To be sure, the rules that the FCC has adopted impose a per-call compensation obligation on carriers. *See* 47 C.F.R. § 64.1300(a), (b). But that does not mean that the obligation can be regulated under Section 201(b). The carrier's obligation under the Commission's rules is to *pay* for a service – the use of a payphone – not to *provide* service under any particular terms. Failure to pay payphone compensation affects neither the service that a carrier's customer receives nor the charges that the carrier's customer must pay.

1. The details of the FCC's payphone regulations make that conclusion inescapable. When the FCC adopted the original payphone compensation rules, its preference was to allow the market to govern payment of compensation to payphone providers, an approach it applied to both local coin calls and some long-distance calls. *See First Payphone Order*,[10] 11 FCC Rcd at 20567, 20569-70, ¶¶ 49, 50, 53, 55. The FCC determined, however, that it could not rely entirely on market forces to govern compensation for toll-free and access-code calls (the types of calls at issue here): because Congress had prohibited payphone providers from blocking calls made using access codes (and, effectively, toll-free numbers as well), payphone providers lacked bargaining leverage with respect to such calls. *See id.* at 20567, ¶ 49. The FCC chose, therefore, to adopt a *default* compensation regime for such calls "that will apply only in the absence of a negotiated agreement between the parties." *Id.* at 20577, ¶ 71.[11] Carriers and payphone providers are thus free to contract around the default compensation regime. And, if payphone providers and carriers do enter into such negotiated agreements, they are enforceable under ordinary contract law, not through any statutory right of action.

Furthermore, the FCC made clear that payment of per-call compensation would *not* have any direct effect on the rights and obligations of carriers and their customers with regard to provision of communications service. "[U]nder the carrier-pays system, individual carriers, while obligated to pay a specified per-call rate to [payphone service providers], have the option of recovering a different amount from their customers, *including no amount at all.*" *Id.* at 20584, ¶ 83 (emphasis added). In our experience, carriers' practice following the adoption of per-call compensation regulations was to

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[10] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*").

[11] The FCC has repeatedly revised the per-call rate, but it has always been a default rate, not a mandated rate.

impose a surcharge on their customers for calls placed from payphones *without regard* to whether the carrier actually rendered payment to the payphone provider.[12]

One might argue that it is unjust and unreasonable for a carrier to impose a payphone surcharge if the carrier fails to pay required charges for the use of the payphone. But, granting the point for the sake of argument, it is the *charge imposed on the customer* that would be unlawful under Section 201(b), not the failure to pay the payphone provider. If a carrier imposes *no* surcharge on its customer, as it may choose to do under the FCC's rules, *see supra*, there is no plausible argument that failure to pay the payphone provider could render the terms of service unjust and unreasonable. The argument thus reinforces the point that Section 201(b) governs the terms under which service is rendered to the customer, not the relationship between the carrier and its suppliers.[13]

2. An interpretation under which a failure to pay per-call compensation constitutes an unjust and unreasonable practice under Section 201(b) fails for the independent reason that there is a jurisdictional mismatch between the coverage of Section 276(b)(1)(A) and the coverage of Section 201(b).

By its plain terms, Section 201(b) applies only to "interstate or foreign communication." 47 U.S.C. § 201(a); *see id.* § 201(b) (referring to "charges, practices, classifications, and regulations for and in connection with such communication service"). By contrast, Section 276(b)(1)(A) explicitly addresses both "intrastate and interstate" matters by requiring the FCC to adopt regulations to ensure compensation for *all*

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[12] *See, e.g.*, MCI Telecommunications Corp., Tariff F.C.C. No. 1, § C.3.02120 ("Payphone Use Surcharge") (filed Oct. 30, 1996).

[13] An additional analogy further illustrates the point. Under rate-of-return regulation, if a carrier incurred costs imprudently, some of those costs could be disallowed in the setting of rates. But regulators would not, as a result, void any existing contracts between the carrier and the supplier. The carrier would pay according to its contractual obligations, but customers would still be required to pay only the just and reasonable tariffed rate established by the regulator.

calls from payphones. *Id.* § 276(b)(1)(A); *see Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 561-63 (D.C. Cir. 1997) (per curiam), *clarified on reh'g on other grounds*, 123 F.3d 693 (D.C. Cir. 1997). The FCC has done so by requiring carriers – including local exchange carriers and intra-LATA (*i.e.*, intrastate) toll carriers – to pay compensation for all calls – including intrastate calls – for which payphone providers are not otherwise compensated. *See* 47 C.F.R. § 64.1300. A local exchange carrier's failure to pay compensation associated with an intrastate call from a payphone – which unquestionably implicates the FCC's payphone regulations – is not even arguably related to any interstate communication service. For this reason alone, Congress would have understood that Section 201(b) – which addresses only those practices that are "in connection with" *interstate* communication services – would not be available to address the subject matter of Section 276(b)(1)(A), which by design is directed at both intrastate and interstate calls.

This is not to say that the FCC is somehow limited in its ability to enforce Section 276, or that Section 2(b) places any restriction on the FCC's ability to adopt rules implementing that section. *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999). The point is that Section 276 cannot be read to expand the scope of Section 201(b) to reach matters that have no relation to interstate communications; yet that is the effect of the Ninth Circuit's decision.

3. The FCC's statement in the *Third Payphone Order* that "[a] failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasonable practice in violation of section 201(b) of the Act," 18 FCC Rcd at 19990, ¶ 32, cannot support the decision below.

First, the FCC's statement – which is unreasoned and unnecessary for the resolution of the matter before the agency in that proceeding – is not entitled to deference. The rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) – that an agency's interpretation of an ambiguous statute is entitled to deference – does not alter

the bedrock principle of administrative law that a regulation cannot stand if it is "arbitrary, capricious, or manifestly contrary to the statute." *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (internal quotation marks omitted). A purported agency interpretation that is unsupported by reasons – that is, an interpretation that "reflects no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, [and] no application of expertise" – is not entitled to deference. *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997); *see also Public Citizen, Inc. v. United States Dep't of Health & Human Servs.*, 332 F.3d 654, 661 (D.C. Cir. 2003) (where agency statement contained "no reasoning that we can evaluate for its reasonableness, the high level of deference contemplated in *Chevron*'s second step is simply inapplicable"). This Court alluded to this very principle just a week ago. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, No. 04-1527, slip op. at 6 (U.S. May 15, 2006) ("[B]ecause neither the EPA nor FERC has formally settled the definition, or even set out agency reasoning, these expressions of agency understanding do not command deference from this Court.").

Second, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI*, 512 U.S. at 229. For the reasons set forth above, the FCC's purported interpretation of Section 201(b) conflicts with the clear meaning of the statute.

D. Although Section 201(b) does not provide payphone providers a private right of action to sue a carrier for violation of the FCC's payphone compensation regulations, that does not make those rules unenforceable. On the contrary, no party disputes that the FCC has broad *regulatory* authority to enforce the rules it has adopted under Section 276.

First, Section 503 of the Act allows the FCC to impose civil forfeitures (and Section 502 creates criminal sanctions) for willful violation of the Commission's regulations. *See* 47 U.S.C. §§ 502, 503.

Second, a payphone provider may invoke the FCC's adjudicatory authority to seek a ruling that a particular carrier owes it per-call compensation. *See* 47 C.F.R. § 1.2 (noting that the FCC may "on motion or on its own motion issue a declaratory ruling terminating a controversy"). If the Commission issues an adjudicatory order for the payment of money, that order is enforceable by private parties in court. *See* 47 U.S.C. § 407.

Third, Section 276(b)(1)(A) directs the Commission "to prescribe regulations that . . . establish a per call compensation *plan* to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." *Id.* § 276(b)(1)(A) (emphasis added). That provision provides the FCC with ample authority to establish any required procedures and issue such adjudicatory orders as are necessary to the enforcement of its regulations. *See also id.* § 154(i) (noting that the Commission may "issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions"). If the FCC deems its existing procedures (or non-statutory court remedies, such as collection actions) inadequate, it has the authority under Section 276 to establish new procedures that will better effectuate congressional intent.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-705

GLOBAL CROSSING TELECOMMUNICATIONS, INC., PETITIONER

v.

METROPHONES TELECOMMUNICATIONS, INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE UNITED STATES AS AMICUS CURIAE FOR DIVIDED ARGUMENT AND TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting respondent and that the United States be allowed ten minutes of argument time. Respondent has agreed to cede ten minutes of argument time to the United States. Granting this motion therefore would not require the Court to enlarge the overall time for argument.

Under rules promulgated by the Federal Communications Commission, an interexchange carrier (IXC) must pay a payphone service provider (PSP) for each completed "dial-around" call made to the IXC's long-distance access lines using the PSP's payphones.

This case presents the question whether an IXC's failure to pay compensation to the PSP as required by the Commission's rules is an "unjust or unreasonable" practice in violation of 47 U.S.C. 201(b), and thus is actionable under Sections 206 and 207 of the Communications Act, 47 U.S.C. 206 and 207, which create a private cause of action for any violation of the Act.

Congress has directed the Commission to "take all actions necessary to prescribe regulations that * * * ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. 276(b)(1)(A). In the course of prescribing such regulations, the Commission determined that an IXC's failure to pay the required compensation violates Section 201(b), and that conclusion was a premise of the Commission's reasoning in selecting the appropriate rules under Section 276(b)(1)(A) to ensure that PSPs are compensated. See Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996, 18 F.C.C.R. 19,975, 19,990 ¶ 32 (2003). Accordingly, the validity of the Commission's specific determination that a failure to pay compensation violates Section 201(b), as well as a key premise of the compensation rules that the Commission has put into place under Section 276(b)(1)(A), is directly at issue in this case. More generally, the government has a strong interest in the construction of the substantive and remedial provisions of the Communications Act at issue in this case.

The United States has filed a brief as amicus curiae supporting respondent in this case, and the FCC participated as amicus curiae in the court of appeals in this case, as well as in the D.C. Circuit case with which it conflicts, APCC Servs., Inc. v. Sprint Commc'ns Co., 418 F.3d 1238 (D.C. Cir. 2005), petition for cert. pending, No. 05-766 (filed Dec. 12, 2005). We believe that oral presentation of the views of the United States would be of material assistance to the Court.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

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IN THE

Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF SPRINT COMMUNICATIONS COMPANY L.P. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 201(b) of the Communications Act of 1934, 47 U.S.C. § 201(b), creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, *Amicus Curiae* Sprint Communications Company L.P. is a limited partnership and is indirectly wholly-owned by Sprint Nextel Corporation. The partners of Sprint Communications Company L.P. are: U.S. Telecom, Inc., which is the general partner and wholly-owned subsidiary of Sprint Nextel Corporation; UCOM, Inc., which is a limited partner; Utelcom, Inc., which is a limited partner; and Sprint International Communications Corporation, which is a limited partner. Sprint Nextel Corporation is a holding company which offers shares of stock to the public under the symbol "S". Only Sprint Nextel Corporation offers shares of stock on public markets. No person or entity owns more than ten percent of Sprint Nextel Corporation's stock.

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GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF SPRINT COMMUNICATIONS COMPANY L.P. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

Sprint Communications Company L.P. ("Sprint") respectfully submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

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[1] This brief is submitted on written consents of the parties, which were filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part, and no persons other than Sprint made a monetary contribution to the preparation of this brief. Sup. Ct. R. 37.6.

INTRODUCTION AND INTEREST OF SPRINT AS *AMICUS CURIAE*

Sprint is an interexchange carrier ("IXC") and provides telecommunications services nationwide. In § 276 of the Telecommunications Act of 1996, Congress directed the FCC to develop a regulatory plan that promotes competition for payphone services to the benefit of the general public. The FCC regulations at issue implement part of that mandate by establishing a compensation scheme for payphone service providers ("PSPs") when their payphones are used by consumers to place certain types of calls without using coins ("dial-around" or "coinless" toll-free calls). The FCC considered various regulatory options, including requiring callers to pay for use of the payphone equipment, as well as billing the parties who receive such calls ("called-parties"), similar to long distance "collect call" charges. Ultimately, the FCC chose for "administrative convenience" to require IXCs (like Sprint) and other carriers, known as switched-based resellers ("SBRs"), to pay the regulatory fee whenever their facilities are used in the path to transport and terminate coinless calls placed from a PSP's equipment.

The FCC has modified its payphone regulations several times, both in response to legal challenges and to address aspects of the compensation scheme that have proven unworkable. Although Sprint has complied with its duties under these various regulations, numerous PSPs have asserted claims for unpaid compensation against Sprint. These claims are primarily based on allegations that SBRs have failed to compensate PSPs for calls that the SBRs terminate. The PSPs have used ambiguities in the regulations (and their various iterations) to contend that Sprint should be responsible for compensating PSPs for these calls (in essence, as a "guarantor" of the SBRs). These claims involve proper interpretations of the FCC's various orders and complex, highly technical fact issues, including tracing hundreds of millions

of coinless calls over multiple networks involving potentially four or more carriers, determining if a particular call was "completed" and subject to the regulatory fee, and, if so, establishing the identity of the last IXC or SBR in the call path. The FCC has the expertise required to resolve these interpretative and technical issues; no court or jury is equipped to do so.

The question presented transcends the interests of the parties and is important to all PSPs, IXCs, SBRs, and the general public. Moreover, Sprint was an appellant in *APCC Services, Inc. v. Sprint Communications Co.*, 418 F.3d 1238 (D.C. Cir. 2005), *reh'g denied*, 04-7034, 2005 U.S. App. LEXIS 24402 (D.C. Cir. Nov. 10, 2005), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (05-766) ("*APCC*"). In *APCC*, Sprint argued—and the D.C. Circuit held—that Congress did not intend for violations of the FCC's payphone regulations to be privately enforceable under §§ 276, 201(b), 407, or 416(c) of the Communications Act. 418 F.3d at 1245-49. APCC sought review of that decision by this Court. The Court is holding consideration of APCC's petition and granted review only of the Ninth Circuit's ruling on the § 201(b) question, as presented by Petitioner here.

SUMMARY OF ARGUMENT

Section 276 was not enacted for the benefit of PSPs but rather to promote widespread competition for and deployment of payphone services to the benefit of the general public. The statute directs the FCC to establish a regulatory plan to accomplish these objectives. Nothing in the text or structure of § 276 indicates that Congress intended for this regulatory plan to be privately enforceable in court. Because congressional intent is determinative, the Ninth and D.C. Circuits correctly held in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003), and *APCC* respectively that there

is no private right of action for alleged violations of the FCC's payphone regulations.

In the present case, the Ninth Circuit inexplicably strayed from the text and structure of § 276 in holding that § 201(b) affords the basis for private enforcement of the payphone regulations through the right of action established in §§ 206 and 207 of the Act. This ruling cannot be squared with the Ninth Circuit's prior determination of the congressional intent in *Greene*, and improperly allows the more general statute, § 201(b), to displace the more specific one, § 276. Moreover, alleged violations of the payphone regulations bear no resemblance to the conduct that Congress proscribed in § 201(b). Although § 201(b) is broad, it only regulates the practices of a common carrier with respect to its customers (including other carriers). Section 201(b) does not apply to a common carrier's alleged failure to pay the regulatory fee for the public's use of payphone equipment, as established in the FCC's payphone regulations. Section 201(b), therefore, cannot serve as the basis for private parties to bring suit under §§ 206 and 207 for alleged violations of the regulations.

Finally, in *Greene*, the Ninth Circuit found that Congress did not intend to place interpretation and enforcement of the payphone regulations "'in the hands of private parties and some 700 federal district judges, instead of in the hands of the [FCC].'" 340 F.3d at 1053 (citation omitted). Payphone compensation disputes involve complex, highly-technical issues, including tracing hundreds of millions and sometimes billions of payphone calls to identify the different carriers in the call path and whether the call was completed (and hence compensable). Experience shows that the courts are not equipped to handle these cases, much less resolve them in a manner that promotes a coherent national regulatory policy. Past disputes that were improperly filed in the courts have been mired in litigation and required referral of multiple issues to the FCC for guidance. The FCC alone has the

expertise necessary to resolve such claims and has adjudicated numerous administrative complaint proceedings with relative efficiency. This further demonstrates that Congress could not possibly have intended for violations of the FCC's payphone regulations to be privately enforceable, as the Ninth Circuit originally—and correctly—determined in *Greene*.

ARGUMENT

A. Section 276 Directs The FCC To Develop A Coherent National Regulatory Plan For Payphones To The Benefit Of The General Public.

Section 276 of the Act is designed to promote "competition among payphone service providers [and] the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). The provision was enacted to address significant technological innovations that enabled (1) a vast array of *non*-carriers, like hotel, restaurant, truck-stop, gas station, and other commercial establishment owners, to provide payphones to the public in competition with the Bell Operating Companies ("BOCs"), which historically provided such equipment; and (2) users of this *non*-carrier payphone equipment to "dial-around" the coin requirements using credit cards, access codes, and other calling platforms. *See New England Pub. Comme'ns Council, Inc. v. FCC*, 334 F.3d 69, 71 (D.C. Cir. 2003) (discussing "dial-around" calls and advances in computer technology allowing new entrants to offer competitive payphone service) (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* ("*Payphone Docket*"), Notice of Proposed Rulemaking ("1996 NPRM"), 11 F.C.C.R. 6716, 6718-20 (1996) (¶¶ 2-6)).

The most relevant mandate of § 276 directs the FCC to "establish a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ." 47

U.S.C. § 276(b)(1)(A). Prior to this regulatory mandate, the BOCs had been able to recoup their investments in payphone equipment through the access charges they assessed against IXCs. Independent PSPs had no such mechanism. Congress wanted to level the playing field by establishing a non-discriminatory compensation scheme that encouraged further competitive investments in and deployment of payphone equipment and services. *Id.* § 276(a), (b)(1)(A)-(E). *See also* 1996 NPRM, 11 F.C.C.R. at 6718-20 (¶¶ 2-6) (describing objectives).[2]

Over the past decade, the FCC has considered various regulatory approaches to compensate PSPs for coinless calls and issued a series of orders attempting to implement the directive of § 276(b)(1)(A). *Payphone Docket*, Report & Order ("1996 Order"), 11 F.C.C.R. 20,541, 20,580-86 (¶¶ 77-87) (1996).[3] One approach would have required the *calling*

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[2] Dial-around or coinless calls traditionally have accounted for only a fraction of payphone usage. The regulatory compensation plan for coinless calls mandated in § 276(b)(1)(A) was, if anything, secondary to the principal requirements of § 276. The other provisions in § 276(a) and (b) direct the FCC to take a variety of steps to eliminate BOC payphone subsidies and to prohibit BOC discrimination in the provision of services to payphones, thereby spurring greater market-based competition for payphone equipment and services for all types of payphone calls.

[3] *See also Payphone Docket*, NPRM, 11 F.C.C.R. 6716 (1996); Report & Order, 11 F.C.C.R. 20,541 (1996); Order on Reconsideration, 11 F.C.C.R. 21,233 (1996), *aff'd in part and remanded in part sub nom. Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997); Second Report & Order, 13 F.C.C.R. 1778 (1997), *aff'd in part and remanded in part sub nom. MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report & Order and Order on Recons. of the Second Report & Order, 14 F.C.C.R. 2545 (1999), *aff'd sub nom. APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); Second Order on Recons., 16 F.C.C.R. 8098 (2001); Third Order on Recons. and Order on Clarification, 16 F.C.C.R. 20,922 (2001), *remanded sub nom. Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); Fourth Order on Recons. and Order on Remand, 17 F.C.C.R. 2020

party to deposit coins into the payphone before placing a call. 1996 NPRM, 11 F.C.C.R. at 6730 (¶ 27). Another approach would have charged the *called party* a "set use" fee for the payphone call, which would have been billed and collected by IXCs on a monthly basis (much like a collect call). *Id.* at 6729-30 (¶ 26). The FCC concluded that either of these approaches would satisfy § 276(b)(1)(A)'s mandate, but ultimately determined that it would be more administratively efficient to adopt a "carrier-pays" approach, under which the IXC or SBR that "terminates" the payphone call compensates the PSPs. 1996 Order, 11 F.C.C.R. at 20,586 (¶ 86); *Payphone Docket*, Order on Recons., 11 F.C.C.R. 21,233, 21,277 (¶ 92) (1996). The FCC found this approach "preferable because it would result in less transaction costs because the toll-carrier could aggregate its payments to [PSPs, whereas] [u]nder a set use fee . . . these payments would be spread among a vast number of payphone callers through their individual telephone bills." 1996 Order, 11 F.C.C.R. at 20,580 (¶ 77).

In 1999, the FCC issued another order establishing the compensation rate for the "carrier-pays" approach outlined in its 1996 Order. *Payphone Docket*, Third Report & Order and Order on Recons. of Second Report & Order ("1999 Order"), 14 F.C.C.R. 2545, 2553-54 (¶ 18), 2597-98 (¶¶ 115-116) (1999). The 1999 Order proved to be unworkable in several respects. Most notably, PSPs claimed that they were not receiving compensation for certain dial-around calls handled by SBRs.

(2002); Fifth Order on Recons. and Order on Remand, 17 F.C.C.R. 21,274 (2002), *aff'd sub nom. AT&T v. FCC*, 363 F.3d 504 (D.C. Cir. 2004); Report & Order, 18 F.C.C.R. 19,975 (2003); *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir.), *reh'g denied*, No. 04-7034, 2005 U.S. App. LEXIS 24402 (D.C. Cir. Nov. 10, 2005), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (05-766).

Responding to these complaints in 2001, the FCC concluded that the 1999 Order "ha[d] not had the intended effect of ensuring that PSPs receive compensation for each and every completed, coinless payphone call." *Payphone Docket*, Second Order on Recons. ("2001 Order"), 16 F.C.C.R. 8098, 8103 (¶ 10) (2001). To address these problems, the FCC substantively modified its payphone compensation plan to require the first IXC in the call path to compensate the PSP for a completed coinless call, even if the call was ultimately terminated by a SBR. *Id.* (¶ 11). The IXCs were then assigned responsibility for seeking reimbursement from the SBRs. *Id.* The FCC posited that this new plan should "address the difficulty which PSPs face in obtaining compensation for coinless calls placed from payphones which involve a [SBR] in the call path," and thus "remedy this failure in the [original] compensation regime" established in the 1999 Order. *Id.* at 8098 (¶ 1), 8103 (¶ 10).

The 2001 Order was vacated by the D.C. Circuit, which held that the FCC had promulgated the new compensation plan without proper notice and comment, in violation of the Administrative Procedure Act ("APA"). *Sprint Corp. v. FCC*, 315 F.3d 369, 372, 377 (D.C. Cir. 2003). On remand, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on whether the compensation plan adopted in the 2001 Order or another compensation plan would better satisfy the objectives of § 276. *Payphone Docket*, Further Notice of Proposed Rulemaking ("2003 NPRM"), 18 F.C.C.R. 11,003, 11,005 (¶ 3) (2003).

In October 2003, the FCC issued its third payphone compensation plan. *Payphone Docket*, Report & Order ("2003 Order"), 18 F.C.C.R. 19,975 (2003). The 2003 Order "squarely" places responsibility for payphone compensation on the carrier who terminates completed dial-around calls, whether the carrier is an IXC or a SBR. *Id.* at 19,986 (¶ 24). The 2003 Order also imposes new call-tracking and reporting

obligations to reduce compensation disputes. In announcing this newest plan, the FCC stated that it was "guided by [its] practical expertise in overseeing the various compensation regimes [the agency] implemented since of the adoption of section 276 in the 1996 Act." *Id.* at 19,987 (¶ 26). Because the 2001 Order "did not optimally ensure fair compensation, we are adopting new rules today to replace it." *Id.* at 19,984 (¶ 20).

The FCC has also established detailed administrative complaint procedures for PSPs and IXCs to resolve payphone compensation disputes. 1996 Order, 11 F.C.C.R. at 20,569-73 (¶¶ 55-61). The 1996 Order instructs PSPs to file complaints with the FCC; explains when particular claims are ripe for agency adjudication (*e.g.*, only after a required call "verification" process); provides "timeliness" defenses (*i.e.*, for claims submitted more than a year after a payment period); and establishes when the federal limitations period for compensation claims commences. *Id.* at 20,597-98 (¶¶ 112-114). The FCC has committed "aggressively [to] take action on such complaints." *Id.* at 20,598 (¶ 114). And numerous PSPs have availed themselves of these administrative complaint procedures in seeking alleged underpayments of payphone compensation from IXCs and SBRs. *See, e.g., APCC Servs., Inc. v. Network IP, LLC*, 20 F.C.C.R. 2073 (2005) ("*Network IP*"); *APCC Servs., Inc. v. TS Interactive, Inc.*, 19 F.C.C.R. 10,456 (2004); *Bell Atl.-Del., Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15,918 (2002).

B. Congress Did Not Intend For The § 276 Payphone Compensation Scheme To Be Privately Enforceable.

Whether Congress intended for the FCC's payphone regulations to be privately enforceable is answered by § 276. In *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001), this Court held that the "touchstone" in determining whether a statute

provides a private right of action is congressional intent. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87. The search for congressional intent, therefore, begins and ends with the statutory "text and structure." *Id.* at 288. The "contemporary legal context" in which a statute was enacted is relevant "only to the extent it clarifies text." *Id. Accord Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (holding that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or an implied right of action").

Consistent with these principles, *Sandoval* further instructs that Congress alone can authorize private enforcement of federal regulations. Thus, where a regulation constitutes an "authoritative interpretation" of a statute that is subject to a private action, violation of the regulation equates to a violation of the statute and may be privately enforceable. As this Court explained, "[s]uch regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." *Sandoval*, 532 U.S. at 284. Alternatively, "when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable." *Id.* at 291. Apart from these two circumstances, "it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.*

In *Greene* and *APCC*, the Ninth and D.C. Circuits respectively held that Congress did not intend to create a private right of action to enforce the FCC's payphone regulations. Both courts examined the text and structure of § 276 to ascertain congressional intent, and found no rights-creating language that might possibly confer a private remedy for PSPs against IXCs. Section 276(b)(1) is part of a larger, comprehensive restructuring of the regulatory regime governing payphones. *Cf. New England*, 334 F.3d at 75-76 (noting that the provision is one of several measures intended to implement the "anti-subsidy and anti-discrimination mandates" of Congress). The provision contains no preconception as to how the regulatory scheme should be implemented and imposes no obligations or duties on any private person or entity. It simply directs the FCC to prescribe a new regulatory plan for all completed intrastate and interstate calls originating from payphones. 47 U.S.C. § 276(b)(1)(A). The FCC could have determined to assess the regulatory fee on the callers who use payphones or on the parties they call. 1996 NPRM, 11 F.C.C.R. at 6729 (¶ 24). *See also Greene*, 340 F.3d at 1051 (noting that the FCC could have assigned payment obligations to different entities under the regulatory plan). Although the FCC ultimately determined to assess the regulatory fee on IXCs and SBRs as a matter of "administrative convenience," nothing prevents the FCC from amending its payphone compensation rules to reassign these obligations to different parties, including payphone users or called parties. *See, e.g.*, 1999 Order, 14 F.C.C.R. at 2598 (¶ 116).

Because § 276 leaves development of the compensation plan to regulatory choice, there is no basis to infer (much less unmistakable evidence) that Congress intended for violations of the payphone regulations to be enforceable under the private right of action established in §§ 206 and 207. These provisions only afford a private remedy for damages resulting from a common carrier's alleged violations *of the Act*. 47 U.S.C. §§ 206, 207. Had Congress intended for this private

remedy to apply, it would have written § 276(b)(1)(A) differently and assigned the duty to compensate PSPs for coinless calls on IXCs and SBRs. Indeed, in other parts of § 276, Congress imposed specific duties and prohibitions on the BOCs, making clear its intent that violations of these statutory obligations by the BOCs would be subject to the §§ 206/207 private right of action. *See, e.g.*, 47 U.S.C. § 276(a)(1)-(2). But as the D.C. Circuit correctly observed, "[n]othing in the statute requires the [FCC] to designate the IXC as the party responsible for dial-around payment." *APCC*, 418 F.3d at 1246. The Ninth Circuit similarly held in *Greene* that, "[b]ecause the private right of action created by §§ 206 and 207 extends only to violations of 'this chapter,' and § 276 does not require IXCs to compensate PSPs, there is no 'violation' of § 276 for which a private action explicitly lies for payphone compensation." 340 F.3d at 1050-51.

The D.C. and Ninth Circuits also properly declined to afford *Chevron* deference to the FCC's interpretation of § 276 in the 1999 Order. *Chevron* deference only applies when a statute is ambiguous and the agency's interpretation of it is reasonable. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). The D.C. Circuit acknowledged that the FCC "mentioned [§ 276] throughout [the 1999 Order] as the source of its authority" to implement a payphone compensation plan. *APCC*, 418 F.3d at 1247. But, as the D.C. Circuit further recognized, whether a statute is a source of authority for regulatory action and whether the statute creates a private right of action for violations of agency regulations are two different matters. In light of *Sandoval*, the D.C. Circuit looked to the text and structure of the Act "to determine whether [the statute] displays an intent to create *not just* a private right *but also* a private remedy." *Id.* at 1245 (applying *Sandoval*, 532 U.S. at 286-87 (emphasis added)). Having determined that § 276 is unambiguously directed to the FCC, and does not address the rights or obligations of any private parties, the D.C. Circuit correctly

declined to afford *Chevron* deference to the FCC's notion that IXCs can "violate" the statute. "Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision." *Id.* at 1247.

There is likewise no basis to infer that Congress intended a private remedy for alleged violations of the FCC's payphone regulations. Section 276(b)(1)(A) contains no such authority; nor do §§ 206 and 207. *Greene*, 340 F.3d at 1050-51 (§§ 206 and 207 do not authorize private enforcement of FCC regulations). *See also Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 500 (S.D.N.Y. 2000), *aff'd*, 241 F.3d 242, 248-51 (2d Cir. 2001) (a party seeking relief under §§ 206 and 207 must allege and p[illegible]e damages resulting from a carrier's violation of a specific [illegible]ovision of the Act, not a violation of FCC regulations). As the Ninth Circuit explained in *Greene*, had Congress intended to create a private right of action for violations of the payphone regulations:

> It could easily have done so, as indeed it did elsewhere in the Act. Section 227, for example, authorizes an action for violation of the section "or the regulations prescribed under this subsection." 47 U.S.C. § 227(b)(3)(A). We decline to attribute a similar intent to the regulations prescribed by § 276 given that Congress knew how to create a private action for violating a regulation when it wanted to, yet did not include an action for violating the regulations contemplated by § 276 in the text of § 276, § 206, or § 207.

340 F.3d at 1051.

The text and structure of § 276, therefore, provide no indication that Congress intended to create new individual rights, much less to create a new private right of action. Accordingly, there is no basis for a private suit to enforce the FCC's payphone regulations. The lack of congressional intent in § 276 settles the matter.

C. Section 201(b) Does Not Apply To A Violation Of The Payphone Rules.

The Ninth Circuit improperly strayed from the text and structure of § 276 in accepting the argument of Respondent (and the FCC, as *amicus curiae*) that a violation of the FCC's payphone regulations constitutes an "unjust" and "unreasonable" practice under § 201(b), redressable under the §§ 206/207 private right of action. This determination cannot be squared with the Ninth Circuit's own ruling in *Greene* that Congress did not intend to provide a private remedy for violations of the regulations. As the D.C. Circuit correctly noted, § 201(b) is the more general provision, § 276 the more specific. Absent clear evidence that Congress intended a different result, the specific provision must control. *APCC*, 418 F.3d at 1247. *See also Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). Disregard of this principle is particularly improper here because, as the D.C. Circuit found, it would transform § 201(b) into a "catchall provision, converting any common carrier's violation of a [FCC] order or regulation into a violation of the Act actionable in federal court." *APCC*, 418 F.3d at 1247.

Nor can the FCC's mere assertion that a violation of its regulations constitutes a violation of § 201(b) be fairly viewed as an "authoritative interpretation" of the statute. The FCC only made this claim after *Greene*, in a single, unexplained sentence of its 2003 Order. In the D.C. Circuit's words, the FCC's belated reference to § 201(b) reflects nothing more than an attempt "to manufacture" a private right of action that Congress did not intend. *Id.*

Indeed, an IXC's alleged failure to pay the regulatory fee established in the payphone regulations bears no resemblance to the conduct that Congress intended to proscribe in § 201(b). In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994), this Court

held that a party may not bring suit against a defendant for acts that are not prohibited by the text of the statute which provides a private right of action. The Court rejected use of the implied private right of action under Rule 10b-5 for alleged aiding and abetting of violations of § 10(b), observing that "'§ 10(b) is aptly described as a catchall provision, but what it catches must be fraud.'" *Id.* at 174 (citation omitted). Because nothing in the text or structure of § 10(b) evinces a congressional intent to proscribe aiding and abetting, the Court held that the statute could not be used as a basis for private suits alleging such conduct. *Id.* at 173.

These same principles preclude use of § 201(b) to supply a private remedy for violations of the FCC's payphone regulations. Section 201(b) generally requires that "[a]ll charges, practices, classifications, and regulations" of a common carrier in the provision of communications services to the public must be "just and reasonable." 47 U.S.C. § 201(b). Although the provision is broad, it only regulates the practices of a carrier with respect to its own *customers*. The statutory text cannot be stretched to encompass any and all conduct of a common carrier that the FCC might choose to describe as "unjust" or "unreasonable."

An alleged failure to pay the regulatory fee established in the payphone regulations falls far outside the scope of conduct that Congress prohibited in § 201(b). Section 276 was enacted to address significant technological innovations that have enabled a vast array of *non*-carriers to provide payphone equipment to the public, in competition with the BOCs. *See New England*, 334 F.3d at 71. Congress intended for the regulatory scheme mandated in § 276 to encourage these industry developments by, *inter alia*, establishing a nondiscriminatory mechanism to compensate PSPs for their investments in payphone equipment and services. 47 U.S.C. § 276(b)(1). This congressional objective bears no relation to § 201(b)'s "just and reasonable" standard, which predates

§ 276 and is intended to govern common carrier-customer practices. As the D.C. Circuit noted, the FCC could have required callers, called parties, or others to pay the regulatory fee for use of the payphone equipment. *APCC*, 418 F.3d at 1246. The fact that the FCC decided to impose the regulatory fee on IXCs, for administrative convenience, does not transform the fee into a common carrier "practice" relating to *its* offering of a "communication service" to its customers. Indeed, in many instances, the payphone regulations obligate IXCs to pay the "fee" for *other carriers* (*i.e.*, switchless resellers), when a coinless payphone call terminates over the resellers' services, and then seek reimbursement from these other carriers. 2003 Order, 18 F.C.C.R. at 19,978 (¶ 7 & n.16).

The FCC has cited to various case and agency authorities to support its unexplained and unprincipled "interpretation" of § 201(b). But these authorities only further demonstrate that the scope of conduct prohibited by the statute does not extend to alleged violations of the payphone regulations.

For example, in *APCC*, the FCC relied on *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995), which involved a rate-of-return established by the FCC pursuant to § 205. Section 205 authorizes the agency to prescribe "just and reasonable" rates or practices and makes it unlawful for a common carrier to fail to comply with them. 47 U.S.C. § 205; *see also New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1104 (D.C. Cir. 1987) (describing the FCC's § 205 authority). In *MCI*, some local exchange carriers ("LECs") had charged IXCs rates exceeding the FCC's prescribed rate-of-return. 59 F.3d at 1410. The LECs argued that their excess earnings only violated the FCC's rate-of-return regulations, not the Act. The D.C. Circuit rejected that argument, holding that a LEC's failure to comply with the prescribed "just and reasonable" rate constituted a violation of § 205, and hence a per se violation of § 201(b) subject to the §§ 206/207 private right of action. *Id.* at 1414.

In *APCC*, the FCC attempted to analogize the LECs' violation of the FCC prescribed rate in *MCI* to an IXC's alleged failure to pay the regulatory fee established in the payphone regulations, arguing that both instances involved "'a rather large area for the free play of agency discretion'" to determine what is "'just and reasonable.'" FCC Br. 11 (citation omitted). But the illogic of this argument is shown by the remedy that Congress provided to the FCC for § 201(b) violations; namely, to prescribe a "just and reasonable" rate or practice under § 205, which would then have the "force of a statute" under the Act. The payphone regulations were not promulgated under § 205, but rather implement the directive contained in § 276(b)(1)(A). Whereas Congress imposed a duty on common carriers to comply with FCC-prescribed rates and practices under § 205, it did not impose any duty on IXCs to pay compensation under § 276(b)(1)(A). And, unlike § 205, nothing in § 276(b)(1)(A) gives the compensation plan prescribed by the FCC the force of a statute or otherwise makes noncompliance with it a violation of the Act. *Greene*, 340 F.3d at 1052.

The FCC also cited to *Ascom Communications v. Sprint Communications Co. L.P.*, 15 F.C.C.R. 3223 (2000). *Ascom* involved disputed charges Sprint collected from a customer, Ascom, under a tariff. Calls from Ascom's payphone network were to be aggregated and delivered to Sprint's network. Sprint billed Ascom for some calls that turned out to be fraudulent, including ones that did not originate from Ascom's network. Ascom brought suit claiming that Sprint's billing of calls for which Ascom was not *a customer of Sprint* was an "unjust and unreasonable" practice. *Id.* at 3226 (¶ 7). Nothing in *Ascom* supports the proposition that noncompliance with the payphone regulations violates a common carrier's duties under § 201(b).

Similarly, during oral argument in *APCC*, counsel for the FCC referred to several agency orders finding certain

common carrier practices "unjust and unreasonable" under § 201(b). Each of these orders again involved challenges to the reasonableness of a common carrier's rates, charges, or practices in connection with the offering of (or refusal to offer) a communications service to a customer, either an end user or another common carrier. In five of the orders, the FCC's (or Enforcement Bureau's) § 201(b) determinations were statutorily grounded on express duties imposed by Congress on common carriers under the Act.[4] In the remaining order, the pertinent duty was imposed by the FCC pursuant to

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[4] *See Telephone Number Portability*, 18 F.C.C.R. 23,697, 23,709 (¶ 29 n.76) (2003) ("anticipat[ing]" that a common carrier's failure to port telephone numbers of customers, as required under § 251(b), would violate the agency's number portability rules and constitute an unjust and unreasonable practice under § 201(b)); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,341-42 (¶ 577) (2003) (finding that certain access requirements imposed by incumbent local exchange carriers in providing network elements to requesting competitive local exchange carriers ("CLECs") would constitute an unjust and unreasonable practice under § 201(b)); *NOS Commc'ns, Inc.*, 18 F.C.C.R. 6952, 6961-62 (¶ 15) (2003) (on order to show cause, the FCC preliminarily (1) found that a common carrier induced customers to switch long distance service provider through a false and misleading marketing campaign and (2) issued an order to show cause why the carrier should not be decertified under § 214); *Himmelman v. MCI Commc'ns Corp.*, 17 F.C.C.R. 5504, 5508 (¶ 12), 5509-10 (¶ 16 n.54) (2002) (finding, on a primary jurisdiction referral, that "[a]lthough the Act did not require [the common carriers] to offer two listings per [directory assistance] call, they chose to do so through their tariffs [and o]nce these offers were made, they were obligated to provide the listings in a just and reasonable manner [pursuant to § 201(b)]"; the FCC forbore from prescribing "a specific method of disclosure" to such customers); *Staton Holdings, Inc. v. MCI WorldCom Commc'ns, Inc.*, 19 F.C.C.R. 8699 (2004) (determination by the FCC's Enforcement Bureau that a common carrier negligently disconnected and transferred rights to customer's toll-free vanity number in violation of § 201(b)).

an express grant of authority by Congress under § 214(c) to impose such obligations on a common carrier.[5]

The six orders are reflective of the type of practices that § 201(b) is intended to cover. They do not support the proposition that the FCC may proclaim by order that conduct of a common carrier is "unjust and unreasonable" under § 201(b), thereby triggering the §§ 206/207 private right of action, regardless whether such conduct relates to a common carrier's offering of services to its customers, including other common carriers. As the D.C. Circuit correctly observed, such a result "is not plainly evident from the text of [§ 201(b)], and nothing suggests that Congress intended its words to have such a sweeping effect." *APCC*, 418 F.3d at 1247.

Indeed, under the theory urged by the FCC and Respondent, any violation of any FCC regulation by a common carrier could be classified as an "unreasonable practice" under § 201(b) subject to the §§ 206/207 private action. In addition to stretching § 201(b) far beyond the conduct proscribed by Congress, such an unprincipled result cannot be reconciled with §§ 206 and 207, which expressly limit the private right of action against common carriers to violations *of the Act*. *Greene*, 340 F.3d at 1051; *see also Conboy*, 84 F. Supp. 2d at 500. And, as previously shown, Congress knows how to create a private right of action for agency regulations when that is its intention. *See, e.g.*, 47 U.S.C. § 227; *cf. Greene*, 340 F.3d at 1051 (such provisions show Congress knows how to create a private remedy for violation of FCC regulations).

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[5] *CoreComm Comme'ns, Inc. v. SBC Comme'ns Inc.*, 18 F.C.C.R. 7568 (2003) (common carrier violated express condition to merger, imposed by FCC pursuant to its express authority under § 214(c), by refusing to permit CLECs to use UNEs to transport intraLATA toll traffic).

D. Congress Expected The FCC—Not The Courts—To Administer And Enforce The Payphone Regulations.

In *Greene*, the Ninth Circuit properly found that Congress did not intend to place interpretation and enforcement of the payphone regulations "'in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission.'" *Greene*, 340 F.3d at 1053 (citation omitted). By interpreting § 201(b) to encompass violations of the payphone regulations, the Ninth Circuit's ruling in this case improperly permits an "end run" around the regulatory plan contemplated under § 276. The courts are ill-suited to handle the complex, highly-technical issues presented in such cases. If allowed to stand, the ruling will impede the development of a coherent national regulatory policy, undermine the congressional objectives of § 276, and harm the public interest.

There are numerous examples of payphone compensation disputes that demonstrate these points. For example, in December 1998, Phone-Tel Communications, Inc., a PSP, filed a putative class action against Sprint, AT&T, and WorldCom on behalf of all PSPs nationwide, excluding LECs. *Phone-Tel Commc'ns, Inc. v. AT&T Corp., et al.*, Civil Action No. 98-CV-6486 (E.D. Pa.) ("*Pennsylvania Action*"). The *Pennsylvania Action*, like the *APCC* case, alleged that Sprint and the other IXC-defendants violated the payphone regulations by failing to compensate the PSPs "for each and every" completed payphone call. *Pennsylvania Action*, Compl. ¶ 47. In June 2000, the district court issued an order staying the action and referring four issues to the FCC on primary jurisdiction grounds. The court "conclude[d] that . . . plaintiff's claim raises certain technical and policy issues within the special competence of the FCC . . . ." *Phone-Tel Commc'ns, Inc. v. AT&T Corp.*, 100 F. Supp. 2d 313, 315 (E.D. Pa. 2000). For example, "[e]stablishing defendants' obligation to compensate plaintiff where defen-

dants are unable to determine whether a call originates from a payphone requires an interpretation of the FCC's order instructing LEC's to implement FLEX-ANI technology." *Id.* at 318. "For the court to divine a definition of a 'completed' call without an informed appreciation of the technology needed to implement it in the first place would be an empty gesture." *Id.* at 321. The court similarly required guidance on determining: (1) when a coinless call is "completed" for compensation purposes; (2) the proper per call compensation rates during different time periods due to changes in the FCC regulations; and (3) who bears responsibility for compensating a PSP for calls initially carried on the first facilities-based carrier's network but subsequently transferred to other carriers, including SBRs, during the call path. *Id.* at 322.

In October 1999, two PSPs, Flying J, Inc. and TON Services, Inc., filed a different suit against Sprint, which was one of a series of suits they brought against carriers alleging failure to pay the regulatory fee established in the payphone regulations for coinless calls placed from payphone equipment at their truck-stop facilities. *Flying J, Inc., et al. v. Sprint Commc'ns Co. L.P.*, Civil Action No. 1:99-CV-111-ST (D. Utah) ("*Utah Action*"). In January 2000, the court referred four issues to the FCC on primary jurisdiction grounds. The court held that referral to the FCC was necessary because the agency alone had the requisite expertise and resources to resolve the issues and to ensure uniformity in the regulation of PSP compensation. *Utah Action*, Order . . . Granting in Part & Denying in Part Sprint Communications' Mot. to Dismiss or, in the Alternative, to Stay on the Basis of Primary Jurisdiction & Granting Sprint Communications' Mot. to Dismiss Plaintiffs' Claim for Punitive Damages at 10 (Jan. 10, 2000). Among the referred issues were determining: (1) when SBRs become responsible for the regulatory fee when there are multiple carriers in the call path; (2) the proper retroactive adjustment or "true up" of payments due to changes in the FCC's regulations; (3) how set-offs should be

made for overpayments of the fee; and (4) the proper fees for "interim" periods. *Id.* at 9-10.

The experiences of the district court and the parties in a case that APCC brought against AT&T are similarly probative. *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101 (D.D.C. 2003), *rev'd, APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (05-766). The case was filed in early 1999 (and preceded APCC's companion case against Sprint). Although the district court refused to make a primary jurisdiction referral to the FCC, the court and the parties soon confronted vexing difficulties in trying to conduct even basic discovery on the PSP's compensation claims. In May 2001, the court appointed a special master to assist with the effort. But by the time the case was certified to the D.C. Circuit for interlocutory appeal (along with Sprint's case) in December 2003, the docket already contained more than 110 entries and was still bogged down in burdensome and expensive discovery with no end in sight. As the district court described in its certification order:

> The cost of discovery related to the telephone calls alone will exceed any possible damages award, because "there are likely over *one billion* separate calls to argue about here." (AT&T's Mot. at 15.) In fact, the parties have already expended a substantial amount of resources attempting to design acceptable protocols to analyze a selected 2000 phone calls and have spent more than $1 million relating to document discovery. (*See* AT&T's Mot. at 19; AT&T's Reply at 11 n.5.) And, although significant efforts have been made to gather discovery, AT&T claims that because of the sheer volume of information involved, neither plaintiffs nor the carriers have any rational basis upon which to evaluate possible settlement—*more than four years after the filing of the suit*. (*See* AT&T's Mot. at 16.)

Id. at 109 (emphasis in original). The D.C. Circuit was thus right, in its ruling on the interlocutory appeal, to express

concern about the "potential consequences to judicial dockets" if the FCC and other federal agencies were free to declare, based on general liability provisions like § 201(b), that violations of their regulations should be privately enforceable. *APCC*, 418 F.3d at 1248.

In contrast to the mired litigations in the courts, numerous PSPs have used the FCC's administrative complaint procedures to seek alleged underpayments of payphone compensation from IXCs and SBRs. *See, e.g., APCC Servs., Inc. v. Network IP, LLC*, 20 F.C.C.R. 2073 (2005) (holding defendants liable for compensation required under the payphone regulations) (heard and resolved within two years and eight months); *APCC Servs., Inc. v. TS Interactive, Inc.*, 19 F.C.C.R. 10,456 (2004) (awarding approximately $545,000 plus interest for unpaid compensation) (heard and resolved within two years and one month); *Bell Atl.-Del., Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15,918 (2002) (determining that IXCs were not required to pay compensation to PSPs for payphone calls terminated by SBRs) (heard and resolved in seven months). The agency's orders in these administrative proceedings again demonstrate the complexity of the factual and legal issues presented by payphone compensation disputes, including the difficulties in tracking payphone calls to completion, in reconciling the different payment responsibilities established under various iterations of the regulations, and in properly interpreting key aspects of the regulatory scheme.[6] As the expert agency, the FCC is uniquely suited

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[6] *See, e.g., Network IP*, 20 F.C.C.R. at 2075 (¶ 5) ("Complicating the [FCC] task . . . is the fact that several entities may be involved, in one way or another, in a particular coinless payphone call."); 2076 (¶ 7) ("with respect to each coinless payphone call, there may be *two* daisy-chains of carriers . . . [a]nd each of these chains can be lengthy") (emphasis in original); *id.* (¶ 8) ("Faced with this complex array, the [FCC has] had a number of options in establishing a [compensation] plan . . . . During the Relevant Period, the [FCC] chose the following plan . . . ."); 2080-81

to resolve such claims and has been able to do so with relative efficiency.

These representative cases further demonstrate that Congress could not have possibly intended for violations of the FCC's payphone regulations to be privately enforceable in court. The FCC alone has the expertise and capability of resolving these types of claims in an efficient manner and, as the Ninth Circuit correctly held in *Greene*, Congress expected the agency—not the courts—to address alleged violations of the payphone regulations as part of the development of a coherent national communications regulatory policy. *Greene*, 340 F.3d at 1053.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's ruling on the question presented.

Respectfully submitted,

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(¶¶ 17-19) (addressing competing interpretations of "facilities-based" carrier under the rules).